
KASHMIR AND THE UNITED NATIONS

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PREFACE

THE KASHMIR PROBLEM will not only shape the destiny of the subcontinent, and serve as the touchstone of international alignments and understandings, but also will have a decisive bearing on the future of the United Nations itself. Literature abounds on the political and historical aspects of Kashmir. The frame of reference of the present enquiry, however, is limited to an assessment of the Security Council's handling of the Kashmir problem. It is proposed, essentially, as a case-study in the competence of the UN in the settlement of international disputes. Much of the bitterness surrounding the issue in India and Pakistan, it appears, can be traced to the respective governments' misconception of the competence of the UN in this regard.

The United Nations, in the opinion of the present writer, was not designed as a dispute-settlement agency in the sense of a municipal court handing out binding judgments on conflicting claims of litigants over real—or otherwise—estate. It does have a great significance as a forum for conflict-resolution through debate and deliberation. But it has no power to dictate solutions, especially in issues involving territorial claims. The United Nations, committed the error of over-evaluation of itself. In what might be termed as an impetuous folly of adolescence, it held out a promise it could never fulfil.

There exists, from the point of view of the United Nations, a fundamental element in the dispute: the use of force by one member-State against another. Two member-States of the United Nations found themselves locked up in a deadly battle over a track of territory with immense geopolitical importance. Twice in the history of this dispute a member of the UN resorted to arms, indirectly in the initial stage and later on openly. Both times the UN successfully brought about a cease-fire. But it was not able to resolve the underlying causes of the disputes. The Western observers and governments chose to view the coercive mood of the party as a kind of rightful indignation born out of deeper frustration

over its ineffectiveness. All the while, however, the disputants as well as other nations made use of the UN forum to let out the steam.

After 18 years of pacification, the UN in the 1965 war at last gave up the role of an arbiter and confined itself to the role of a fire-brigade. The high drama in the Security Council in 1965 commenced characteristically with a mock battle between the US and the USSR representative over the powers of the President of the Council to convene a meeting; the curtain dropping with yet another duel between the super-gladiators over the powers of the Secretary-General in peace-keeping operations. In between there were about five acts culminating every time in a strong resolution "demanding" cease-fire and also containing phrases about the basic issues involved in the conflict. These sessions, commencing on 4 September and ending on 5 November 1965, throw a floodlight on the competence of the United Nations. The interplay of power politics over Kashmir in 1965 was minimal. For the first time there was Great Power unanimity over all the operative paragraphs of the resolutions. The verbal fireworks related to the issue totally unconnected to the Council's immediate concern.

There was concensus till the end amongst the non-permanent members over the steps to be taken. The concensus broke down only in the end when Jordan (presumably on the initiative of Pakistan) wanted the Security Council to go beyond its competence. Even then there was not a single negative vote in all the five resolutions. Jordan merely abstained.

The narration, therefore, commences with the 1965 sessions of the Security Council on Kashmir rather than starting from the very beginning. It is followed by a theoretical appraisal of the competence of the UN in matters affecting peace and security. The latter part of the book is devoted to a narration of the so-called "basic issues," followed, again, by a critical appraisal of the role and competence of the UN in such matters. Stress has been laid on the entanglement of the UN in the elusive concept of self-determination, which has a clearly perceptible applicability in a limited framework of world community.

The burden of the study, additionally, has been to show that the so-called international engagement, that India is alleged to have

made on the question of plebiscite, was, firstly, never a binding one and, secondly, that the 1965 war released India from any legal "commitment" in this regard.

A caveat must be entered at the end. A study dependent solely upon the Security Council documents and official publications of the parties in relation to the problem of Kashmir could hardly be complete. The public postures of delegations in the Council, needless to point out, are always preceded by behind-the-scene negotiations and deliberations. Interviews with important delegates who participated in the decision-making process over Kashmir at the UN would have been extremely useful in the interests of further understanding of the problem. But, since that would have involved staggering sums for field research, the author had to rely entirely upon published sources.

Some interesting discoveries were made in the process. The citation, for instance, of the Pakistan Government awarding Hilal-e-Pakistan to de Murville of France, revealed that France had objected to the "proposals made by certain powers to impose sanctions against Pakistan during the 1965 war." Again, the cause for the failure of UN conciliation, according to Urrutia, the Colombian delegate, was the insistence of certain members of the United Nations Commission on India and Pakistan (UNCIP) to nominate an American as the Plebiscite Administrator against the wishes of the Indian Government which had proposed the name of the Chairman of the International Red Cross Commission. Also, the Chinese delegate confessed in the Security Council in 1957 that the members never gave any thought to India's original complaint of Pakistani complicity and aggression in Kashmir.

However, since the above revelations relate to the problem as to "why" and "how" the UN acted the way it did, an enquiry more amenable to political, sociological, and behavioural analysis, it was thought, will have marginal significance in a study dealing exclusively with the "what" of the UN competence in regard to the problems of coercion and self-determination.

RAHMATULLAH KHAN

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It is with no usual sense of routine that I acknowledge my sincere gratitude and appreciation to many people who helped, directly or indirectly, in the completion of this study. Some of them prefer to remain anonymous, which makes my task doubly difficult. I would have had the consolation at least of having recorded my grateful thanks. Now I will be doing it only in a sort of muffled voice.

Another category of gentlemen who have also contributed to the fulfilment of this task are a few friends, though not directly yet have done a great deal by way of moral and material support. For a scholar belonging to a minority community it is indeed a terrible job to write on such a delicate subject. A writer who comes out in support of the government stand, consciously or unconsciously, is in a worse predicament than the one who arrives at conclusions at variance with that of the government policy. The latter at worst becomes the target of official wrath or at best becomes a hero with chances of becoming a martyr. But the former is suspect throughout. In such a situation an understanding friend is a real boon. I had such friends whom I prefer not to name. My sincere thanks go to them.

It gives me genuine pleasure to extend my boundless gratitude to the staff of the Library of the Indian School of International Studies and the Indian Council of World Affairs, especially Mr Girja Kumar, the Librarian, who was always a source of strength. Mrs Andrade, Mrs Shaukat Ashraf, Mrs Chaya Devi, and Miss Shanta Sehgal were the very personification of graciousness, and Mr Ansari a tower of strength in the Library. I am particularly thankful to some of my students who went through parts of my MSS and gave valuable suggestions; and to Miss Lakshmi Devi who patiently went through the MSS, checked the footnotes, and pointed out many inaccuracies in the text. Finally, I am deeply indebted to Dr M.S. Rajan, Director of the Indian School of International Studies, and to Dr R.P. Anand, Professor and Head, Department of International Law, Indian School of International Studies, both of whom readily agreed to allow me to work on this project with the minimum of class work, and encouraged me to undertake this study.

LIST OF ABBREVIATIONS

AJIL	*American Journal of International Law*
ASIL	*American Society of International Law*
BYIL	*British Yearbook of International Law*
I & CLQ	*International and Comparative Law Quarterly*
IJIL	*Indian Journal of International Law*
IYBIA	*Indian Year Book of International Affairs*
SCOR	*Security Council, Official Records*
S/ . . .	*Security Council, Documents*
S/PV	*Security Council, Provisional Verbatim Records*
GAOR	*General Assembly, Official Records*
UNCIO	*United Nations Conference on International Organization*, San Francisco
YBWA	*Year Book of World Affairs*

CONTENTS

CHAPTER ONE

THE WAR

SUBVERSIVE INTERVENTION

THE SECURITY COUNCIL was informed, on 3 September 1965, by Secretary-General U Thant of the "dangerously serious" situation in Kashmir.[1] On the basis of the findings of General Nimmo, Military Chief of the United Nations Military Observers Group in India and Pakistan (UNMOGIP), the Secretary-General reported a series of violations of the cease-fire line (CFL) commencing on 5 August 1965 "in the form of armed men, generally not in uniform, crossing the CFL from the Pakistan side for the purpose of armed action on the Indian side." General Nimmo stated that the Secretary-General had arrived at the above conclusion "on the basis of investigations by the United Nations Observers, in the light of the extensiveness and character of the raiding activities and their proximity to the CFL, even though in most cases the actual identity of those engaging in the armed attacks on the Indian side of the line and their actual crossing of it could not be verified by direct observation or evidence."[2]

Part II of the above report, which contained an annotated list of incidents since 5 August,[3] in an unambiguous language confirm-

[1]*Report by the Secretary-General on the Current Situation in Kashmir with Particular Reference to the Cease-Fire Agreement, the Cease-Fire Line, and the Functioning of UNMOGIP*, S/6651, 3 September 1965. The Secretary-General submitted a number of reports to the Security Council on various aspects of the Kashmir situation in 1965. (Hereinafter these would be cited merely as S-G's Report No.... etc.)

[2]*Ibid.*, *SCOR*, 20th year, Supp. for July, August, and September 1965, p. 242.

[3]S-G's Report, S/6651, *SCOR*, 20th year, Supp. for July, August, and September 1965, p. 245. As regards cease-fire violations since the beginning of 1965 until mid-June General Nimmo reported that he had received a total of 2,231 complaints from both sides. The UNMOGIP confirmed on investiga-

ed attacks by Pakistani infiltrators. General Nimmo bore witness to the fact that the abandoned weapons of the raiders sometimes "had their markings scratched off"[4] and that "some of the materials said to have been abandoned by the raiders were manufactured in Pakistan."[5] General Nimmo also reported that the "dress worn by the dead raiders was similar to the uniforms of Pakistan frontier scouts,"[6] and that sometimes they dressed themselves in "green 'selwa' shirts and 'kamiz' trousers. The clothing and general appearance of the bodies led the Observers to believe that they were those of Azad Kashmir soldiers."[7]

General Nimmo also referred in his despatch to interviews of the captured raiders and mentioned of one "who stated that he was a soldier of the 16th Azad Kashmir Infantry Battalion and that the raiding party was composed of about 300 soldiers of his battalion and 100 *mujahids* (armed civilians trained in guerilla tactics)."[8] At another place General Nimmo reported of a captured prisoner who "informed the observers that he was a member of the Karakoram Scouts (based in the Skardu sector on the Pakistan side) and that he and a number of other scouts had been selected to destroy the bridge at Gund on the Srinagar-Leh road."[9]

In a subsequent despatch General Nimmo also reported that a "captain captured at the Haji Pir Pass was interviewed by a United Nations observer and stated that he belonged to the 6th Azad Kashmir Battalion and was in charge of 100 *mujahids* whose task was to harass Indian troops covering Uri."[10]

On the basis of General Nimmo's findings, the Secretary-General in his report to the Security Council pronounced that the cease-fire agreement of 29 July 1949 "has collapsed, although I hope only temporarily." He refrained, however, from making an assessment of the political background of the problem or the possible root causes of the dangerous situation prevailing in Kashmir, because he "could not presume to act as political arbiter."[11] The report also

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tions 377, 218 of which were committed by Pakistan and 159 by India. (*Ibid.*, p. 241.)

[4]*Ibid.*, p. 246. [5]*Ibid.*, p. 247. [6]*Ibid.*, p. 248.

[7]*Ibid.*, p. 251. [8]*Ibid.*, p. 247. [9]*Ibid.*, p. 252.

[10]S-G's Report, S/6661, 6 September 1965. (*Ibid.*, p. 270.)

[11]S-G's Report, S/6651, 3 September 1965. (*Ibid.*, p. 240.)

contained a narration of events leading to the escalation of the conflict, confirming Pakistan shelling, on 1 September 1965, of Indian pickets and a battalion headquarters in the Chamb area, an air attack on Jurian, etc.

Referring to his efforts to put an end to the fighting, the Secretary-General reported that he had urged the Pakistan representative to "observe" the cease-fire line and had appealed to the Indian representative to seek the path of "restraint." Further, he added:

> I have not obtained from the Government of Pakistan any assurance that the cease-fire and the CFL will be respected henceforth or that efforts would be exerted to restore conditions to normal along that line. I did receive assurance from the Government of India, conveyed orally by its representative to the United Nations, that India would act with restraint with regard to any retaliatory acts and will respect the cease-fire agreement and the CFL if Pakistan does likewise.[12]

Pakistan's attitude to the Secretary-General's efforts to restore normalcy on the cease-fire line was further brought into sharp relief in a reference to his draft statement on the situation as of 16 August. He reported the reactions of India and Pakistan as follows:

> The Government of India had no objection to the release of the statement but at first wished certain modifications, which, in part at least, I regarded as unacceptable. The Government of Pakistan was strongly negative about the statement in general on the grounds that it favoured India in that it dealt only with the current cease-fire situation without presenting the political background of the broad issue and thus was lacking in balance, since a cease-fire alone supports the *status quo* to India's benefit.[13]

The Secretary-General's view of the matter was "that resort to force in the settlement of a dispute of this kind is contrary to

[12] *Ibid.*, pp. 243-4. [13] *Ibid.*, p. 244.

both the spirit and letter of the Charter,"[14] and that his "first and primary objective had to be to see the fighting end rather than indicating or denouncing any party for starting and continuing it."[15] (His earlier statement that he "could not presume to act as political arbiter" might be also recalled.) In line with this thesis the Secretary-General suggested that restoration of normalcy on the cease-fire line depended upon:

(*a*) a willingness of both parties to respect the agreement they have entered into;

(*b*) a readiness on the part of the Government of Pakistan to take effective steps to prevent crossings of the CFL from the Pakistan side by armed men, whether or not in uniform;

(*c*) evacuation by each party of positions of the other party to its own side of the line, which would include the withdrawal once more of Indian troops from Pakistan positions in the Kargil area;[16]

(*d*) a halt by both parties to the firing across the CFL that has been occurring from both sides in some sectors with artillery and smaller guns;

(*e*) allowing full freedom of movement and access to United Nations observers by both parties on both sides of the line.[17]

The salient features of the Secretary-General's reports to the Security Council may be summarized as under: (*i*) that Pakistan had violated the agreement of 1949 by sending infiltrators across

[14]See S-G's letters to the President of Pakistan and the Prime Minister of India, S/6647, 1 September 1965. (*Ibid.*, p. 233.)

[15]S/6651. (*Ibid.*, p. 244.)

[16]Amidst pre-5 August forays across the cease-fire line Indian troops had occupied in May Pakistani positions in the Kargil area of Kashmir, which India considered strategically vital to the security of the Srinagar-Leh Road. On an appeal from the Secretary-General and on an assurance that UN Observers would be stationed on both sides of the line in that area, India had withdrawn its troops. When subsequently "there were some military attacks on the road by armed elements from the Pakistan side" (as the Secretary-General himself confirmed) India had reoccupied those positions 10 days after the extensive infiltration commenced, i.e. on 15 August 1965. (See S/6651, *ibid.*, p. 245.)

[17]*Ibid.*, p. 245.

the CFL for purposes of armed action and sabotage, which was confirmed by the Security Council's own organ; (*ii*) that Pakistan regarded the CFL alone as supporting the *status quo*, implying thereby that it did not wish to abide by it; (*iii*) that the Secretary-General was unwilling to go into the root causes of the trouble and wished to confine himself to the primary objective of restoring peace in the area; and (*iv*) that the steps suggested by the Secretary-General for the restoration of normalcy clearly indicated, despite the diplomatic language employed and the restraint to apportion blame, that peace in the area could be achieved only if Pakistan respected the CFL and also took steps to prevent further infiltration.

In this uninhibited and broad frame of reference the Security Council met, on 4 September 1965, under the chairmanship of Arthur Goldberg (USA) to tackle what it called the "India-Pakistan Question." Secretary-General U Thant's appeal to the two States urging respect for the CFL and his report on the current situation in Kashmir were included in the agenda.

The points worth noting at this stage are: first, the Security Council did not meet at the initiative either of India or Pakistan, but was convened by the President of the Security Council, Goldberg, on the basis of a report submitted by the Secretary-General;[18] second, the Secretary-General's telegrams to the President of Pakistan and the Prime Minister of India and his report on the current situation were placed on the agenda "as part of the consideration of this item of our agenda," i.e. "the India-Pakistan Question." This attitude to the India-Pakistan war of 1965 was to assume grave import later in the debates. Strangely enough, no significance was attached to the phraseology of the President or the caption on the agenda at that stage, not even by Parthasarthi, the Permanent Representative of India. It would have been apposite for India to have insisted on a debate on the "current situation" on the cease-fire line rather than throw open the whole range of problems between the two countries or to dig up the past Kashmir "commitments."

[18]For a lively academic debate on the President's powers to convene such a meeting under rules of the Security Council, see S/PV 1237, pp. 2-51.

Parthasarthi, making an able presentation of the Indian case, supplied flesh and blood to the skeletal story of armed infiltration handed out by the UN observer team and the Secretary-General. Citing extensively Pakistan authorities' scant regard for the cease-fire prevailing in Kashmir, Parthasarthi said that the war by infiltration was carefully planned by Pakistan and had the blessings of President Ayub Khan himself. Over the years, said the Indian representative, Pakistan had perfected the technique of sending armed troops across the cease-fire line in civilian disguise; that these armed civilians were in most cases part of Pakistan's regular or irregular troops; that the so-called *mujahids* were formed in June 1965 into a regularly constituted Pakistan Mujahid Force with commissioned officers, JCOs, NCOs, and other ranks.[19]

On 5 August 1965, continued Parthasarthi, large bodies of Pakistan troops in civilian disguise, fully armed with automatic weapons, supplied with rations and huge amounts of Indian currency, carrying transistors and propaganda literature, began to infiltrate across several carefully selected sectors; up in the north near Chaknar, Keran, and Tithwal; on the western sector of the line at Uri, Poonch, Mendhar, Rajaori, and Naushera. The infiltrators also crossed into the Chamb and Samba sectors of the international border. The strength of the infiltrators was estimated at about 5,000. As for their objectives, Parthasarthi said:

> Their immediate objects, according to the documents captured from them and statements made by prisoners, were to destroy bridges, police stations, petrol pumps and other important installations, and also to cut roads. Further, they were to capture the summer capital of the State, Srinagar, especially the adjacent airfield. Among their other objectives was the assassination of political and other leaders, as also the general terrorizing of the population by setting fire to schools, hospitals, etc., and attacking places of worship. They sought to conceal themselves in the forests and mountainous terrain, and some of the parties managed to reach the outskirts of the capital, Srinagar. There were attempts to cut the Srinagar-Leh road, which is India's vital line of

[19]*Ibid.*, p. 68.

> communication with the north-eastern portion of the State. Large groups of these armed troops clashed with Indian Security Forces within a depth of five to ten miles of the Cease-Fire Line from Poonch to Naushera on the western sector of the Line. Heavy casualities were inflicted on these men and large numbers of them surrendered themselves to the authorities.[20]

Evidence was also adduced to the effect that the infiltrators were trained at Murree, West Pakistan, and were named as "Gibraltar Force," under the command of General Akhtar Hussain Malik, General Officer Commanding the Twelfth Division of Pakistan.

Parthasarthi affirmed that, as a "purely defensive measure," Indian troops had to occupy Pakistan's positions across the CFL in the Kargil, Tithwal, and Uri sectors, "firstly, to seal off the routes of escape, and, secondly, to prevent crossings of the Cease-Fire Line by additional troops in civilian disguise from the Pakistan side."[21] He further said that, having failed in their mission to create a popular revolt by the people of Kashmir with the help of the armed infiltrators, the Pakistan authorities sent their regular troops in brigade strength supported by armoured regiments and by fast modern aircraft across the international boundary in the south-western part of Jammu and Kashmir. He stated categorically: "All this leaves no doubt that the attack was premeditated, well planned, and in utter violation of the Charter of the United Nations, the generally accepted principles of international law and the Cease-Fire Agreement."[22] The Indian representative "formally" demanded "of the Security Council to condemn Pakistan as an aggressor and to instruct it to withdraw from all parts of the Indian State of Jammu and Kashmir."[23]

The Pakistan representative, Syed Amjad Ali, pleaded lack of instructions from his government and reserved his right to express his viewpoint "on this matter, of supreme consequence to us, at a subsequent meeting of the Council."[24] Thereupon, the Malaysian representative, Ramani, proposed a draft resolution, on behalf

[20]*Ibid.*, pp. 61-2.
[21]*Ibid.*, pp. 64-5.
[22]*Ibid.*, p. 66.
[23]*Ibid.*, pp. 73-5.
[24]*Ibid.*

of the six non-permanent members of the Council—Bolivia, Ivory Coast, Jordan, Malaysia, the Netherlands, and Uruguay. The resolution said that the Security Council had noted the report of the Secretary-General (S/6651, 3 September 1965) and heard the statements of India and Pakistan, and was concerned at the deteriorating situation along the cease-fire line in Kashmir,

> 1. call[ed] upon the Governments of India and Pakistan to take forthwith all steps for an immediate cease-fire;
> 2. call[ed] upon the two Governments to respect the cease-fire line and have all armed personnel of each party withdrawn to its own side of the line;
> 3. call[ed] upon the two Governments to co-operate fully with the UNMOGIP in its task of supervising the observance of the cease-fire.[25]

It further requested the Secretary-General to report to the Council within three days on the implementation of that resolution. The resolution was adopted unanimously.

India's call to the Security Council, to condemn Pakistan's aggressive act in sending armed infiltrators across the cease-fire line in Kashmir, fell on unwilling ears. This comes out clearly in the brief debate that ensued the introduction of the draft resolution. Ramani of Malaysia himself emphasized

> that the draft resolution makes no findings; it produces no judgments on the distressing and tragic situation that has suddenly developed along and beyond the cease-fire line between India and Pakistan in Kashmir. I am sure either side has at its elbow all the valid reasons to explain and perhaps, too, to justify how this came about and also why it could not be avoided and had to occur. For the immediate present, I venture to think, we should avoid getting entangled in these reasons, having regard to the urgency which faces the Security Council this afternoon.[26]

[25]S/6657, 4 September 1965, *SCOR* Resolutions and Decisions, 1257thMeeting, Resolution No. 209 (1965).

[26]S/PV 1237, p. 77.

Throughout the rest of the debate the same feelings of abstinence from value-judgments were expressed by delegations. Cessation of hostilities was considered the primary, though limited, objective of the Council. "Force cannot settle the issue," said the Netherlands representative.[27] Lord Caradon of the UK said that "continued fighting can bring only disastrous consequences to all directly concerned and to the whole subcontinent and also the cause of international security."[28] The representative of the USSR, Morozov, after an initial attack on the "vestiges of colonialist policies" of Britain, affirmed the belief that the cessation of armed conflict will gradually lead to the establishment of mutual understanding and cooperation between India and Pakistan.[29] Liu of China expressed the opinion that it was "no time to go into the background of the Kashmir question or to pass judgment on the latest violations of the cease-fire agreement."[30]

The Indian delegate, Parthasarthi, deplored the fact that the Security Council had not evolved an acceptable guarantee from Pakistan that infiltrations across the cease-fire line would be stopped forthwith and that the infiltrators would be withdrawn. And the Pakistan delegate Ali regretted "that the draft resolution does not even refer to the basis of the cease-fire, which was established in Kashmir in 1949, the basis of the demilitarization and the plebiscite." He wondered "how, without an earnest of the Security Council's intentions to engage in serious efforts toward the settlement of the Kashmir dispute, in accordance with the wishes of the people of Kashmir as pledged to them by the United Nations, any appeal from the Security Council will effectively and convincingly restore the peace which we all desire."[31]

The concern of the United Nations with the immediate objective of restoring peace, India's insistence on acceptable guarantees that there would be no repetition of infiltration and the withdrawal of the infiltrators already in the State of Jammu and Kashmir, and Pakistan's efforts to open afresh the whole Kashmir question, are recurring themes in the subsequent debates.

Not unexpectedly the Security Council resolution of 4 September 1965 went unheeded by the concerned parties. Meanwhile, the

[27] *Ibid.*, p. 87. [28] *Ibid.*, p. 88. [29] *Ibid.*, p. 97.
[30] *Ibid.*, pp. 98-100. [31] *Ibid.*, pp. 119-20.

fighting had escalated. India and Pakistan were now involved in open battle on the international border. The Secretary-General reported that there was no official response to the cease-fire call of the Council, and that the conflict between India and Pakistan was "broadening and intensifying."[32]

The Security Council again met on 6 September 1965 to consider further action to restore peace in the subcontinent. This time the Pakistan delegate put forth a highly emotional performance charging India with "a most brazen aggression," "a deliberate transgression of the very purposes and principles of the United Nations," and comparing Indian leadership with "Hitler and the Nazis."[33] He affirmed categorically that "no troops of Pakistan or Azad Kashmir crossed the cease-fire line."[34] The Pakistan delegate had nothing whatsoever to say on the demand of the Council for a cease-fire made earlier on 4 September 1965. There was a bland denial of responsibility for the armed infiltration, disregarding completely the UN Observers' findings.

C.S. Jha, the Foreign Secretary of India, on the other hand, emphatically maintained that the withdrawal clause in paragraph 2 of the 4 September resolution (that called upon the two governments to "have all armed personnel of each party withdrawn to its own side of the line") must be interpreted to "include all infiltrators from the Pakistan side of the cease-fire line, whether armed or unarmed."[35] In the light of General Nimmo's findings (on "armed men, generally not in uniform, crossing the CFL from the Pakistan side for the purpose of armed action on the Indian side") and the Secretary-General's recommendation in his first report (urging Pakistan "to take effective steps to prevent crossing of the CFL from the Pakistan side by armed men, whether or not in uniform"), Jha's demand was eminently reasonable. He demanded of the Council an answer to this question: "Is it permissible for a State, a neighbouring State, to send thousands of armed personnel into another State to commit illegal acts? Does that

[32]S-G's report, S/6661, 6 September 1965, *SCOR*, 20th year, Supp. for July, August, and September 1965, p. 269; for the draft resolution which took note, with deep concern, of the extension of fighting, see S/PV 1238, p. 37.

[33]S/PV 1238, 6 September 1965, pp. 3-5.

[34]*Ibid.*, pp. 8-10. [35]*Ibid.*, p. 21.

not amount to aggression? Does that not amount to a flagrant violation of the Charter?"

The Security Council answered this by passing a resolution unanimously—sponsored again by the six non-permanent members—which after noting the Secretary-General's report about the extension of the fighting with deep concern, called upon "the parties to cease hostilities in the entire area of conflict immediately, and promptly withdraw all armed personnel back to the positions held by them before 5 August 1965"; and then went on to request the Secretary-General to exert every possible effort to give effect to this resolution.[36]

Ramani of Malaysia, who had what he termed the "melancholy privilege" of introducing the joint draft resolution, reiterated that it "makes no findings, produces no judgments," on the basic issues.* The Secretary-General announced at the end of the meeting that he would "exert every effort toward the ends we all seek, including a very early visit to the area"; and the President of the Council, Goldberg, affirmed that they had placed the authority of the Security Council behind the Secretary-General.[37] Thereupon the issue of armed infiltration by Pakistan receded into the background, coming up again at the time of the deadlock over disengagement.

As to Pakistan's version of the armed infiltration, the earlier bland denials were slowly given up. On 17 September, the Law Minister of Pakistan presented to the Security Council the Pakistani story of infiltrations. Citing some foreign observers, Zafar maintained that India had "raised the question of the so-called infiltrators in order to cloud the issue of the Indian aggression,"[38] "to launch a new campaign of terror and repression against the people of Jammu,"[39] and that it was a popular uprising. A more daring proposition followed:

> India has claimed that the so-called Pakistani infiltrators must be members of the Pakistan Army or Azad Kashmir forces because they were armed and well trained. The fact, however, is that the Pakistan side of the cease-fire line has been under

[36] *Ibid.*, pp. 37-40. *S/PV 1237, p. 77. [37] *Ibid.*, pp. 42-51.
[38] S/PV 1240, 18 September 1965, pp. 8-10. [39] *Ibid.*, p. 11.

> such heavy firing from the Indian forces during the last year that Azad Kashmir nationals, living along the cease-fire line, approached the Azad Kashmir Government for armed protection by Azad Kashmir forces. They were informed that this was not a practical proposition. Alternatively, therefore, they suggested that they should be given arms to defend themselves. And these arms were therefore provided to them to defend themselves. Most of these men, it should be noted, are ex-servicemen. The people of Azad Kashmir have a long tradition of fighting with armed forces. They are well-versed in the art of fighting. Some of these people may have joined the revolt in the valley.[40]

Thus there was, on the one hand, the UN Observers' findings that there was extensive armed infiltration across the CFL from the Pakistan side, and, on the other, admission by the Pakistan representative of supply of arms to people on the Azad Kashmir side of the CFL "to defend themselves," some of whom "may have joined the revolt in the Valley."

The infiltration is a repeat performance of the 1948 episode. And the pattern of UN handling of this coercive element, which was contrary to traditional international law and a violation of the letter and the spirit of the Charter, again, was thoroughly ineffective.

TRIBAL RAIDS, 1947-48

The handling of the Kashmir problem in the initial stages by the Security Council was characteristically described by Noel-Baker of the United Kingdom as "fiddling with phrases while Kashmir burned."[41] The chronicle of the Indian case and the clever exploitation of some of the weaker points thereof by the Pakistan representative, Sir Zafrullah Khan, would reveal that it could not have been otherwise.

By a letter dated 1 January 1948 the Government of India submitted the Kashmir question to the Security Council.[42] From the middle of September 1947, infiltration of armed raiders into Jammu

[40] *Ibid.*, p. 13. [41] S/PV 237, p. 36.
[42] S/628, 1 January 1948, *SCOR*, 3rd year, Supp. for November 1948, p. 139.

and Kashmir had commenced. The invaders were armed with modern weapons, including mortars and medium machine-guns. They were using man-pack wireless sets and employing Mark II mines. Fighting in regular battle formations, an estimated 15,000 raiders had captured a large area of the State.

The Indian case was that the invaders were allowed transit across Pakistan; that they were allowed to use Pakistan territory as a base of operations; that they included Pakistan nationals; that they drew much of their military equipment, transportation, and supplies from Pakistan; and that Pakistan officers were training, guiding, and otherwise actively helping them. India charged that such assistance was an "act of aggression against India."[43] In the final paragraph of the letter it claimed that preservation of peace in the area was not only in the interests of both States but also in the "interests of the world."

Explaining its legal interest the Indian letter stated that as the threat to the Valley of Kashmir became grave the ruler of the State had appealed to the Government of India for military help. A similar appeal was received from the State's popular leader Sheikh Mohammad Abdullah. The State had acceded to the Indian Union which thereupon promptly sent military help. Then followed the suggestion which was to become the central issue later:

> But, in order to avoid any possible suggestion that India had utilized the State's immediate peril for her own political advantage, the Government of India made it clear that *once the soil of the State had been cleared of the invader and normal conditions restored*, its people would be free to decide their future by the recognized democratic method of a plebiscite or referendum which, in order to ensure complete impartiality, might be held under international auspices.*

If the emphasis and the purpose of bringing the matter before the Security Council are borne in mind the above suggestion would look like a concessionary offer in the nature of an inducement for

[43]S/628, paragraph 1.
*S/628, paragraph 6, p. 141. (Italics ours.)

Pakistan to prevent the armed raids. The specific Indian demands made on the Council in the operative paragraph of its complaint, however, were:

(1) to prevent Pakistan Government personnel, military and civil, from participating or assisting in the invasion of the Jammu and Kashmir State;

(2) to call upon other Pakistani nationals to desist from taking any part in the fighting in the Jammu and Kashmir State;

(3) to deny to the invaders: (*a*) access to the use of its territory for operations against Kashmir, (*b*) military and other supplies, (*c*) all other kinds of aid that might tend to prolong the present struggle.[44]

The natural and ordinary course open for the Council faced with a complaint of aggression—whether the party claiming to be the victim of aggression calls for condemnation or merely urges the Council to use its influence and power to suppress the act of aggression—is to institute an investigation, or, if there is a *prima facie* case, order a cease-fire. If the other party also makes a countercomplaint of aggression, it becomes incumbent on the part of the Council to verify the facts of the situation, while ordering an immediate cease-fire. But it is no more a simple dispute which in the framework of Chapter VI does not involve actual use of force; nor even a situation which is *likely* to endanger international peace and security, in other words, likely to *lead* to contention of armed forces.

Where a situation is brought to the Security Council's notice which already involves an armed conflict, and when a party accuses the other of aggression and the latter (while denying at first its complicity pleads at the same time its *inability* to prevent the armed raids) countercharges with aggression elsewhere, the Council has no option but to treat the original complaint as substantially verified and take suitable action, leaving the other matter for separate action. But it has no option to treat the whole thing as a "dispute" or "situation" within the meaning of Chapter VI. Whatever the

[44]S/628, paragraph 13, p. 143.

tone of reference and whatever the provision under which the reference is made, the Council has to take action consistent with the gravity of the situation.

While the whole tenor of reference, and the teminology employed, in the Indian complaint was one of war and peace, amenable for action under Chapter VII, India preferred to deal with the complaint under Chapter VI. But the only reference to Chapter VI in the Indian complaint was the opening sentence. Yet all that India asked for under Chapter VI was a cease-fire, not a settlement of the problem by the Security Council. In addition, India was wary of the hostile atmosphere in the Council. It was afraid that the UK and the USA which were largely instrumental in evolving solutions to the Kashmir problem would thrust a bitter-sweet potion through India's throat, and that India would be bound by such solutions if dictated under Chapter VII. While hindsight proves that such Indian fears were well founded—as would be attested to in the ensuing pages—any such action (viz. dictation by the Council of a solution to the problem) would have been *ultra vires* of the Charter.

The Charter provision under Article 39, which authorizes the Security Council to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42," etc., does not empower the Council to dictate solutions to the underlying political causes, but only authorizes it to recommend or decide upon measures "to maintain or restore international peace and security." The word "recommend" refers to its power to recommend to some members, including the parties, to take certain measures for the restoration of peace. Or, alternatively, it might "decide" to take measures *itself*. Both the powers refer to the *means* through which it can act, and not to its extent of power. The extent of authority is spelt out in Articles 40, 41, and 42.

The Security Council, therefore, could have enforced a cease-fire, for which India was all too willing, and which in the circumstances would have meant only prevention of the armed raids across Pakistan territory. It was constitutionally incapable of dictating a solution to the underlying political cause, or effect. For that it had to fall back upon its suasive authority under Chapter VI of the Charter.

Pakistan took 15 days to prepare its case. It succeeded in submerging the simple issue into the wider squabbles of the subconti-

nent. The Security Council had to acquiesce in this. For, a dispute under Article 35 involved presentation of charges and countercharges, complaints and defence of both the parties to the dispute, whereas under Article 39 the Council would have proceeded straight to the determination of the breach of peace, or threat thereof, under a fact-finding machinery of its own choosing.[45]

By a letter dated 15 January 1948, the Government of Pakistan presented its own case.[46] The letter contained three decuments: the first was a reply to the Indian complaint; the second, a countercomplaint about a number of other disputes which Pakistan claimed were likely to endanger international peace and security; and the third document was in the nature of details substantiating the reply and the countercomplaint.

As for the Indian complaint, Pakistan denied emphatically that it was giving aid and assistance to the invaders. On the contrary, it said, "the Pakistan Government have continued to do all in their power to discourage the tribal movement by all means short of war."[47] The immediate inference from this statement was an admission that there was a tribal movement, as the statement further admitted: "It may be that a certain number of independent tribesmen and persons from Pakistan are helping the Azad Kashmir Government in their struggle for liberty as volunteers, but it is wrong to say that Pakistan territory is being used as a base of military operations," etc.[48] Pakistan in effect admitted the fact of invasion by tribesmen; it also confessed that some Pakistani nationals were involved, but, as for its complicity, it took umbrage under denials. On the other hand, it pleaded its inability to stop the tribal invasion "short of war." It was thus a clear case of war and peace best suited to be dealt with under Chapter VII of the Charter. But any such action was forestalled by Pakistan's manoeuvre in obfuscating the issue.

Document II of Pakistan's letter, which was in the nature of a countercharge, made many allegations. The salient features of

[45]Ernest L. Kerley, "The Powers of Investigation of the United Nations Security Council," *AJIL*, Vol. 55, 1961, pp. 892-918.

[46]S/646, 15 January 1948, *SCOR*, 3rd year, Supp. for November 1948.

[47]*Ibid.*, paragraph 3, p. 68.

[48]*Ibid.*

Pakistan's countercomplaint against India were that India, having never reconciled itself to partition, was trying to undo the past and destroy Pakistan. It charged the Government of India with a preplanned and extensive campaign of "genocide" against Muslims in East Punjab, Delhi, Ajmer, and in the States of Kapurthala, Faridkot, Jind, Nabha, Patiala, Bharatpur, Alwar, and Gwalior, etc. It contended that the security, freedom, well-being, religion, culture, and language of the Muslims of India were being threatened. It brought up the question of accession of Junagadh, Manavadar, and some other States in Kathiawar, charging that those States had lawfully acceded to Pakistan but were forcibly occupied by Indian troops. On the question of Kashmir it alleged that the accession to India was obtained by "fraud and violence." Making some more allegations the Pakistan Government requested the Security Council to intervene in the affairs of the subcontinent and urged the Council to appoint a commission to investigate the facts. Pakistan's purpose evidently was to submerge the Kashmir question into the whirlpool of emotional issues. Any attempt to settle these questions in isolation from the rest was, Pakistan insisted, "bound to end in frustration."[49]

The Security Council slowly slided into this path of frustration. The Council met on 15 January for a substantial debate on the Kashmir problem after an initial postponement to wait for the arrival of the Pakistan Foreign Minister, Sir Zafrullah Khan. The letter from the representative of India, referred to earlier, was adopted without discussion as the item on the agenda.[50] Gopalaswami Ayyangar presented the Indian case at length reiterating and emphasizing the Indian complaint. He urged the Security Council to apply itself to the "simple and straightforward issue"[51] of Pakistan's abetment of the tribal raids on Kashmir and demanded that the Council should ask Pakistan to discharge its neighbourly duties.

The next day Sir Zafrullah narrated for five and a half hours a gruesome tale of atrocities being committed in the subcontinent. He admitted, however, at the outset that in the post-independence

[49] *Ibid.*, paragraph 5, p. 75.
[50] S/PV 227, 15 January 1948, p. 11.
[51] *Ibid.*, pp. 81-5.

human miseries on the subcontinent, neither "side was free from blame."[52] The President of the Council for that month Van Langenhove of Belgium, at the end of the presentation, introduced a draft resolution which

> *call*[*ed*] upon both the Government of India and the Government of Pakistan to take immediately all measures within their power (including public appeals to their people) calculated to improve the situation and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation;
>
> *and further request*[*ed*] each of those Governments to inform the Council immediately of any material change in the situation which occurs or appears to either of them to be about to occur while the matter is under consideration by the Council, and consult with the Council thereupon.[53]

The draft resolution was in the nature of an interim order. The President of the Council explained that the factors necessitating that resolution were the gravity and complexity of the situation and that the resolution would not commit the Council on the substance.[54] The consensus in the Council appeared to be in tune with the President's reasoning. But the Soviet and the Argentine delegates struck a note of dissent. The Soviet delegate, Gromyko, urged the Council to "study the question more thoroughly and adopt a resolution as soon as possible dealing with the substance of the question."[55] Arce, the Argentinian representative, viewed the matter with much graver concern than other delegates. His view was that "either of the two States before us now, India or Pakistan... is to be regarded as an aggressor."[56] He voted in favour of the draft resolution, nevertheless, with a lament "that the non-permanent members of the Council have little power in respect of the substance of such questions."[57] The draft resolution was adopted by nine votes to none, the USSR and Ukraine abstaining.

[52]S/PV 228, 16 January 1948, p. 26.
[53]S/PV 229, 17 January 1948, pp. 97-100.
[54]*Ibid.*, pp. 96-9. [55]*Ibid.*, pp. 116-20.
[56]*Ibid.*, p. 126. [57]*Ibid.*, pp. 127-30.

The second resolution adopted, on 20 January 1948, on the same voting pattern was a clear indication of the effect of Pakistani presentation of the case in the Council. Under this resolution, a commission was established which was composed of representatives of three members of the UN, one to be selected by India, another to be selected by Pakistan, and the third to be designated by the two so selected. The Commission, which was to proceed to the spot immediately, was invested with a dual function: (*i*) to investigate the facts pursuant to Article 34 of the Charter; and (*ii*) to exercise, without interrupting the work of the Security Council, any mediatory influence likely to smooth away difficulties, to carry out the directions given to it by the Security Council, and to report how far the advice and directions, if any, of the Security Council were carried out.

Paragraph D, which is crucial in the present context, prescribed that the functional sphere of the Commission was to be the situation prevalent in the State of Jammu and Kashmir. As far as other matters brought to the attention of the Council by the Pakistan Minister of Foreign Affairs in his letter of 15 January were concerned, it was agreed that the decision was to be taken subsequently by the Council. India had thus won a point by restricting the scope of enquiry only to the situation in Jammu and Kashmir. But it conceded a point when it agreed to Sir Zafrullah's insistence that the words "on the Jammu and Kashmir question" should be deleted from the heading of the draft resolution.[58]

The question of the heading, again, flared up on 22 January with graver overtones. The Security Council was to meet that day at India's initiative to resume the debate on directions to be given to the commission. Sir Zafrullah meanwhile had requested the Council to consider the other matters brought up by him by way of a countercomplaint. The Kashmir question on the agenda for the day was changed into "India-Pakistan Question." The same day Gopalaswami Ayyangar strongly protested at the change which sparked off a heated discussion in the Council.[59]

[58]See for the draft and discussion, S/PV 230, pp. 3-71.

[59]See the interesting debate on the heading of the 20 January 1948 Resolution. (*Ibid.*, pp. 16-20.)

Ayyangar maintained that since the Council was meeting that day to resume debate on the directions to be issued to the commission and since discussion on other matters raised by Pakistan could be taken up separately the Council had no "justification for altering the description of the item on the agenda and, therefore, changing the content of this debate."[60]

Though there was considerable support for the Indian position from the representatives of the USSR and the UK, yet India lost the point ultimately. Gromyko (USSR), however, challenged the right of the President of the Council and the Secretariat to alter an item on the agenda without a formal decision by the Council.[61] Noel-Baker (UK) supporting India made a formal move to have the Junagadh and other questions as Item 3. Arce (Argentina) strongly put forth the view that the Council, being not a court of justice, could ill-afford to ignore Pakistani claims:

> Even supposing that this body were a court of justice, although I do not know what would be the procedure followed in other countries, in Argentina, if a charge were brought up by one party against another in a court and the other party then brought a countercharge, the court would not attempt to separate those two charges. It would take them together and settle them on their merits.[62]

It was, however, the intervention of Austin (US) which tilted the balance in favour of Pakistan. The US delegate argued that, since the question of Junagadh, Manavadar, etc., were specifically raised in Part II of Pakistan's letter of 15 January 1948 which was already an item (*b*) on the agenda and which the Council was bound to take into consideration, the editorial change in the heading would not matter.[63]

Setalvad tried to retrieve the situation the next day. Presenting the Indian case on 23 January 1948, he tried to expose Pakistan's attempt to confuse a clear picture by a calculated countercom-

[60]S/PV 231, 22 January 1948, p. 21.
[61]*Ibid.*, pp. 36-40.
[62]*Ibid.*, p. 42.
[63]*Ibid.*, pp. 52-60.

plaint bristling with irrelevant material.[64] He reminded the Council that the "one issue, and the prime issue, before you is the issue relating to the invasion of Kashmir."[65] But, by way of answering Pakistan's charges of genocide, he submitted a lengthy narration of facts, followed by Pakistan's version.[66] At the end of the two statements Noel-Baker (UK) pointed out that "much has been written in the record of the Security Council which, if the history itself could be rewritten, both parties would desire to expunge."[67]

The success of Pakistan's efforts to obfuscate the clear issue of invasion can be seen in the discussion that followed the submissions of India and Pakistan. The immediate object of the Council was to find out acceptable terms of reference to the commission established on 20 January 1948. The statement of the US delegate, Austin, was of particular significance. He pointed out that even without tracing the facts the Kashmir situation warranted urgent application of all "pacific powers" of the Security Council. He invoked the "ethical" aspects of the UN to establish peace before making a "decision with respect to guilt or with respect to what the actual facts are in detail."[68] Austin proceeded to emphasize the common ground in the disputants' stand, which, according to him, was the Indian offer of plebiscite, "a part of the *res gestae* for India."[69]

The idea of a plebiscite was clutched with fervent enthusiasm by most of the delegations thereupon. De la Tournelle of France hoped that "the first task of this Commission will be to take measures with a view to the early holding of a plebiscite."[70] Hsu (China) was pleased to note that, in spite of all the differences, the two parties were in fundamental agreement, that the case should be settled by pacific means and that the wishes of the people involved should be taken into consideration.[71] El Khouri (Syria) proceeded to suggest the modalities of securing the plebiscite over which there were clarifications from the French delegation.[72]

[64]S/PV 232, 23 January 1948, pp. 12-130. [65]*Ibid.*, p. 26.
[66]See Sir Zafrullah Khan's reply. (S/PV 235, 24 January 1948, p. 2.)
[67]*Ibid.*, pp. 72-5. [68]*Ibid.*, pp. 96-115.
[69]*Ibid.*, pp. 121-5. [70]*Ibid.*, pp. 131-5.
[71]*Ibid.*, p. 136. [72]*Ibid.*, pp. 136-41.

The preoccupation of the Security Council with the idea of plebiscite was clearly brought out in the draft resolutions put forward on 28 January 1948 by the President of the Council on the basis of his talks with the parties. The first resolution simply recognized agreement of both sides to the effect that the future of Jammu and Kashmir "must be decided through the democratic method of a plebiscite or referendum" and took "note with satisfaction of this agreement, which it will take the necessary measures to carry out."[73]

Gopalaswami Ayyangar pointed out that the method by which the Council wished to tackle the problem was somewhat like "putting the cart before the horse." He added:

> Now the stark fact is there: the fighting is going on today; day after day, hour after hour, the situation is deteriorating. Yet it is proposed that we proceed to debate leisurely the question of the manner in which a plebiscite is to be held. On the question that the plebiscite will be held, there is no difference. The only difference is in regard to the manner of holding the plebiscite, the conditions under which the plebiscite should be held. Are we going to waste time on this matter, before we consider the urgent, the immediate question of stopping the fight in Kashmir?[74]

Despite strong protest the Security Council did discuss the conditions and circumstances in which the plebiscite could be held. The rationale for such action could be found in stray statements of the delegations. It was, however, the US delegate, Austin, who provided the legal grounds.

According to Austin, the "parliamentary position" of disputes brought under Chapter VI of the Charter was that these would have to pass the first stage wherein the Council would encourage the parties to negotiate, and attempt to guide them by discussions. If such negotiations failed, the Security Council, if it deemed that the continuation of the dispute was likely to endanger the maintenance of international peace and security, should decide under paragraph 2 of Article 37 upon action to be taken under

[73]S/PV 236, 28 January 1948, p. 11.
[74]*Ibid.*, pp. 51-5.

Article 36 or recommend such terms of settlement as it might consider appropriate.[75] Seizing upon the common ground of plebiscite as a partial negotiated agreement, the Security Council seemed to have felt that the second stage had not yet arrived.

One point that warrants emphasis at this stage is that even if the Security Council were to proceed to act on the second stage it had powers only to make recommendations of "appropriate procedures or methods of adjustment" (paragraph 1 of Article 36), or "recommend such terms of settlement as it may consider appropriate" (paragraph 2 of Article 37). Legally speaking, they are hortatory powers and not binding decisions.

The delegations in the Security Council, partly perhaps on political considerations and partly due to faulty understanding of the authority that the Charter conferred on them, prescribed a wrong remedy. Pakistan openly convassed for a solution of the political cause which would, according to it, automatically bring the fighting to a stop.[76] The representative of UK was convinced that it was "infinitely the best way to stop the fighting."[77] De la Tournelle of France thought that it would be an act of "political wisdom and maturity."[78] And the President of the Council, Langanhove, who was conducting negotiations between the parties, felt that stoppage of conflict and finding a political solution by way of a plebiscite were "two aspects of one and the same problem. Common sense seems to dictate that both these aspects of the problem should be envisaged simultaneously."[79] Arce of Argentina, again using strong (almost intemperate) language, declared that he would not vote for any resolution which does not, as a solution to the question, prescribe that a plebiscite be prepared, held, and conducted freely under the authority of the Security Council. Citing the Latin proverb, *sublata cause, tolitur effectis*, he said: "The cause of all the troubles on the Indian side, the Pakistan side, and the side of tribes is that the upheaval of the people of Kashmir has been considered as a rebellion and that the men in that territory have been regarded as so many heads of cattle instead of as men."[80] The final consideration,

[75] *Ibid.*, pp. 61-2.

[76] See, especially, Sir Zafrullah's remarks. (*Ibid.*, pp. 56-60.)

[77] *Ibid.*, p. 77.

[78] S/PV 237, 29 January 1948, p. 31.

[79] *Ibid.*, p. 16.

[80] S/PV 240, 4 February 1948, pp. 41, 46.

as expressed by the US delegate, seems to have been that, since the choice before the Council was use of force to drive the tribesmen out or hold out the lure of a plebiscite to seek their retirement peacefully, the Council should naturally press for the latter.[81]

Based on above considerations, the Council proceeded to debate on the modalities of a plebiscite. India revolted against this attitude. On 10 February 1948, Gopalaswami Ayyangar formally requested the Council for a long postponement.[82] He assured the Council that he was not altogether withdrawing the case, although the "trends" in the Council had been misguided. He said he could understand the Council's reluctance to "prejudge" the issue but not abdication of its responsibility. Pointing to the assistance being rendered to the raiders by Pakistan, he said:

> I have asked that this assistance should be stopped. That main issue of ours, the issue with which we came here on 1 January, has been drowned in the sea of other issues, many of which are irrelevant to the consideration of it, and others which certainly can afford to wait till fighting has stopped and we have leisure to consider problems which require leisurely consideration.[83]

The import of Ayyangar's protest and the request for postponement of the Council deliberations on questions of a "leisurely character" was perceived by the members of the Council. The disappointment of the Indian delegation was due to the unfavourable trend in the Council on the question of laying the responsibility for the invasion on Pakistan and also because the debate on the causes of invasion was slowly but perceptibly veering round the idea of pressing on India an unpalatable plebiscite. For example, one of the points that was suggested in the Council, presumably on the suggestion of Pakistan,[84] was that the administration which was then

[81] *Ibid.*, p. 56.

[82] S/PV 243, pp. 46-65.

[83] *Ibid.*, p. 52.

[84] Sir Zafrullah had maintained boldly that "the Azad Kashmir Government people will not lay down their arms if a plebiscite is to be held under the authority of Sheikh Abdullah's administration and under the bayonets of the Indian Army." (See S/PV 244, p. 42.)

running the State (Sheikh Abdullah's) be replaced by an outside and neutral administration. India strongly opposed the idea.

The second suggestion was that the Indian Army should withdraw as soon as the conflict was over. Again, the suggestion was resented since India felt that it was responsible for the defence of Kashmir. As regards the plebiscite, India was prepared to hold it under international auspices, and was willing to seek "advice and guidance" from the United Nations. But it certainly would not agree to taking over of the administration by the UN "to exercise executive authority inside the State of Jammu and Kashmir."

The Chinese delegation was the first to take note of India's mood of defiance. Tsiang, in a conciliatory tone, urged the Council not to push the idea of an interim administration with vigour. It would be well, he said, for the Council to avoid any impression that it was "questioning the legitimacy, or constitutionality, or legality of any steps which have been taken so far by the Government of India in handling this matter."[85] But the US and the UK delegates were firmly convinced of the Pakistani argument.

Noel-Baker (UK) referred to the Indian delegate's insistence that the Council must concentrate on stopping the fighting and querried:

> Would it stop the fighting if the Security Council did what he desired?... Suppose we put this demand to Pakistan, and put it now. Would the inhabitants of Poonch and Mirpur and Riasi lay down their arms? Would the volunteers from the West Punjab go home? Would the tribesmen obey the summons of the Security Council and go back to their barren uplands, or would our action have exactly the opposite effect?[86]

This, indeed, is a strange logic and a novel way of maintaining peace and security. Neol-Baker's attitude was tantamount to rewarding aggression. The US delegate made a scathing and satirical attack on the Indian delegate, exhibiting an unprecedented sense of intolerance and ignorance. In arrogant tone, Austin attacked Ayyangar's apprehension of "trends" in the Council. He

[85]S/PV 243, p. 76.
[86]*Ibid.*

said that the Indian delegations' attempts to get the Council take firm measures against Pakistan would amount to taking up a position of an ally in a war. He insinuated openly that India and Sheikh Abdullah were trying to get the Council pull off Pakistan "and allow India to finish the job by force against the tribesmen." That proposition for Austin was "perfectly astonishing." He urged the Indian delegate to take back home the Council's trend "that the United Nations is not engaged in promoting war or taking sides in war."[87]

The Argentine delegate, Arce, echoed bluntly the same feelings. In a manner of series of policy statements he announced that the UN would promote peace, not war; that the UN did not wish to impose a new government on Kashmir; that Kashmir was not a territory of India; that the cause of the trouble in Kashmir was the "rebellion" of the people of Kashmír against their ruler; that it was "absolutely necessary to settle the matter of the plebiscite, first of all, as the only way to stop the war . . . that the Security Council cannot work as a tool for the applicants who came before it."[88]

The Indian case suffered thus a momentary set-back in the United Nations. The simple and straightforward issue of Pakistan's armed infiltration was lost in a variety of squabbles. The fundamental question of indirect and direct aggression was subordinated to the so-called question of plebiscite.

This raises a series of questions of legal and constitutional significance for the United Nations. Also it has grave consequences for the functioning of the United Nations. The legal issue can be formulated thus: was the armed infiltration by Pakistan in 1947-48 as well as in 1965 in conformity with international law? If it was not, as would be shown in the next chapter, was the UN obliged to take cognizance of the same in handling the issue? This aspect of constitutional importance is discussed in Chapter Three. The failure to base itself on firm legal footing led to deadlocks over disengagement, in the short run, and continued tension, in the long run. This consequential aspect of the UN handling is discussed in Chapter Four.

[87]S/PV 243, pp. 87-91.
[88]S/PV 245, pp. 36-45.

CHAPTER TWO

LAW RELATING TO ARMED INFILTRATION AND SUBVERSIVE INTERVENTION

HOSTILE ACTS OF PRIVATE INDIVIDUALS

THE DOCTRINE of State responsibility for hostile actions of private individuals owes its origin, as many other rules of international law, to Hugo Grotius. He formulated the rule of State responsibility on two counts, namely, that "civil authorities are liable for losses caused by their subjects"; the other norm, which was more specific, was that "kings and public officials are liable for neglect if they do not employ the remedies which they can and ought to employ for the prevention of robbery and piracy."[1]

> A civil community, just as any other community, is not bound by the acts of individuals, apart from some act or neglect of its own....
>
> But, as we have said, to participate in a crime a person must not only have knowledge of it but also have the opportunity to prevent it. This is what the laws mean when they say that knowledge, when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not do so; and that the knowledge to be considered here is that associated with the will, that is, knowledge is to be taken in connection with intent.[2]

[1]Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Bk. II, Ch. XVII, Sec. 20 (1) (Trans. by F. W. Kelsey, Washington D.C., 1925).

[2]*Ibid.*, Bk. II, Ch. XXI, Sec. 2; for a critique of this doctrine and generally on the subject, see Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States*, The Hague, 1962, pp. 15-35; see also H. Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States," *AJIL*, Vol. 22, 1928, p. 105.

The history of the doctrine of State responsibility in this field revolved round the above Grotian postulates.

The idea that State responsibility depends upon fault (*culpa*) was mixed up with another shaky norm which refused any status to individuals in international law. The result was that since individuals had no place directly in international law the responsibility for their misdeeds would only be indirectly attributed to the State to which they belonged. And since State responsibility for their acts was not direct, allegations of State complicity had to be strictly construed. So much so, the rule developed that States *per se* were not responsible for private criminal acts, but State responsibility could arise if a degree of connection between the person's act and the State could be established by showing a failure of the latter to discharge its duty of prevention. The duty of prevention was drawn from a State's obligation to respect the territorial sovereignty of its neighbour.

The above formulation of the law has some adherents in modern writers. For a modern exposition one may refer to Professor Edwin M. Borchard's writings on the subject. He holds that the State is not responsible for wrongful acts of private persons, and that the doctrine of implied governmental complicity is only an exception to this rule:

> A long line of cases has established certain qualification upon the non-liability of the government for the wrongful acts of private individuals. These consist in certain manifestations of the actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the individual, or to enable the victim to pursue his civil remedies against the offender.[3]

These conditions of State responsibility have been crystallized by subsequent juristic formulations to the effect that the failure of a government to use due diligence to prevent an injurious act of a

[3]E.M. Borchard, *The Diplomatic Protection of Citizens Abroad: Or the Law of International Claims*, New York, 1927, p. 217.

private person against a foreign State alone constitutes international delinquency.[4] Professor James L. Brierly goes a step ahead of Professor Borchard when he says that the State "is not liable for the acts of a private individual, who is not an 'authority' of the State," and goes on to add:

> Professor Borchard supports this statement of the law with ample reference to authorities. It will be observed that these "qualifications" of the non-liability of the state for the acts of individuals are not, in strict theory, exceptions to the general rule. Even in these cases the state is still not liable for the acts of an individual *as such*, but only for its own delinquency; but the theory of the law has been that wrongful failure either to prevent or to punish the individual's act justifies us in inferring the state's complicity in the act, and consequently in regarding the act as the act of the state.[5]

State responsibility under Professor Brierly's formulations, again, assumes impeachable proportions only on proven complicity and failure to prevent the wrongful private act. The source of responsibility for Professor Brierly is the international delinquency of the State failing to prevent the wrong to the neighbour. By whatever route responsibility is attributed to the State the fact remains that a State might be held responsible. Professor Hans Kelsen arrives at the same conclusions through a distinction of direct and indirect responsibility by negligence.[6] Professor Ross arrives at the same conclusion by laying the responsibility on "the State's own organs, not for the actions of private individuals."[7]

In the *United States* v. *Arijona*,[8] involving counterfeiting of currency within the United States, issued by the Colombian Government, the Supreme Court said:

[4]C.G. Fenwick, *International Law*, Third Edition, New York, 1948, p. 301.

[5]J.L. Brierly, "The Theory of Implied State Complicity in International Claims," *The Basis of Obligation in International Law* (Selected and Edited by C.H.M. Waldock), Oxford, 1958, pp. 152-3.

[6]Hans Kelsen, "Theorie du Droit International Public," *Recueil des Cours*, Vol. 84, 1955-III, p. 90.

[7]Alf Ross, *A Textbook of International Law*, London, 1947, p. 254.

[8]*120 US* (*1887*), p. 497.

> The law of nations requires every national government to use "due diligence" to prevent wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognised.[9]

The examples can be multiplied. The above rulings reaffirm the traditional doctrine that a State can be held responsible for the wrongful acts of its citizen on the proven ground of negligence or fault, and not otherwise.

This rule evidently is calculated to meet minor infractions of one or a group of individuals belonging to one State against the laws of another State. And it would be really unjust to hold a State responsible for the criminal acts of its citizens unless the State's complicity is involved. It is one thing to exonerate, or lay the burden of proof of State connivance, isolated acts against a neighbouring State's criminal laws; it is another thing if the wrongful act is aimed against the territorial integrity or political independence of another State. This distinction would be brought out in the framework of the United Nations Charter, but before that let the law (case law) on hostile military expeditions be examined.

HOSTILE MILITARY EXPEDITIONS

The traditional law on hostile military expeditions is based upon the legal norm that a neutral State must maintain an attitude of strict impartiality toward belligerents in the presence of a war. This norm has equal application in civil strife. The fact that the above rule is not always observed does not weaken the norm as such. It is a well-established principle in the national legal practice of all civilized States. Though originally developed in connection with neutrality, this branch of the law is only an aspect of the general duty of a government to prevent the commission of injurious acts against foreign countries.[10]

[9] *Ibid.*

[10] See R.E. Curtis, "The Law of Hostile Military Expeditions as Applied by the United States," *AJIL*, Vol. 8, 1914, p. 1.

If the general obligation of a State not to allow use of its territory for hostile purposes, against another State is accepted then this duty assumes graduated intensity depending upon the gravity of the situation. In case of a civil strife it is one of non-interference;[11] in the case of war it assumes the character of impartiality.[12] And on the same logic the obligation assumes graver concern during peace-time.[13]

The *causa celebre* in this regard is the *Alabama Claims*[14] case, involving the international liability of Great Britain for its alleged failure to prevent the building and equipping in its ports of naval expeditions in the service of the Confederate States in the American Civil War. This case is important for evolving determinable criteria of the extent of obligation of a neutral State over injurious acts done by its nationals to another State at peace with itself. The first and third of the celebrated "Three Rules" of the Anglo-American Treaty signed at Washington on 8 May 1871 bound a neutral government,

> first to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry out war as above, such vessel having been specially adopted, in whole or in part, within such jurisdiction, to warlike use [and], thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of ... [these] obligations and duties.[15]

[11]N.J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, New York, 1939, p. 119.

[12]H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947, p. 229.

[13]M.R. Garcia-Mora, *op. cit.*, p. 50; see pp. 53-61 for the law and practice of the United States and other countries.

[14](*1872*) *Moore's Arb.*, 656.

[15]See for the text of the treaty, W.M. Malloy, *Treaties, International Acts, Protocols, and Agreements between the United States of America and Other Powers*, Washington D.C., 1910, p. 700.

Acute difference of opinion arose between Great Britain and the US over the interpretation of the phrase "due diligence." The British contended that due diligence "signifies that measure of care which the government is under an obligation to use for a given purpose." On the other hand, the US view was that due diligence must be "proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it."[16] The arbitral tribunal struck a balance by holding that it must be a diligence exercised by neutrals "in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part."[17]

In the absence of a world body competent to decide whether or not a State has used "due diligence" in a particular situation this subjective yardstick was bound to breed dissatisfaction. Attempts were, therefore, made to evolve *in lieu* of this subjective test certain objectively ascertainable criteria. Thus, Article VIII of the Hague Convention XIII of 1907, while borrowing from the Three Rules of the Washington Treaty, replaced the phrase "due diligence" with what was supposed to be a more concrete test, viz. "to employ the means at its disposal." Similarly, the Pan American Convention on the Rights and Duties of States in the Event of Civil Strife, signed at Habana on 20 February 1928, bound the parties "to use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife."[18]

Academic bodies and semi-official organs seized of the problems of international law likewise have tried to contribute some concrete criteria to test State responsibility in this regard. The Institute of International Law, for instance, adopted on 13 August 1875 certain rules, Article 1 of which imposed upon the neutral government the obligation "to exercise vigilance to prevent its territory from becoming a centre of organization or point of depar-

[16]T.J. Lawrence, *Principles of International Law*, Sixth Edition, Boston, 1915, pp. 633-4.

[17]J.B. Moore, *A Digest of International Law*, Vol. 7, Washington, 1906, p. 1067.

[18]46 Stat., Article 1, para 1, pp. 2749-50.

ture for hostile expeditions against one or both of the belligerents."[19]

That, in short, was the position under traditional international law. The modern law of nations appears to have dropped the "due diligence" test. The current opinion seems to follow Professor Hyde's reasoning: "When a State claims the right exclusively to control, such as its own territory, it must possess the power and accept the obligation to endeavour so to control as to prevent occurences therein from becoming by any process the immediate cause of such injury to a foreign State as the latter, in consequence of the propriety of its own conduct, should not be subjected to at the hands of a neighbour."[20]

A number of international instruments contain the above view. The draft definition of aggression, drawn up in 1933 by the Committee on Security Questions of the League of Nations, included as an act of aggression "provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all measures in its power to deprive those bands of all assistance or protection."[21]

The same rule was incorporated subsequently in the convention defining aggression concluded between the Soviet Union and its neighbours in London on 3 July 1933.[22] The Soviet draft on the definition of aggression presented to the UN in 1956 carried over the same idea *verbatim* in Article 1 (*f*). Many other proposals defining aggression presented in 1956 to the UN General Assembly's Special Committee on the Definition of Aggression support the same thesis.[23]

The Draft Code of Offenses against the Peace and Security of Mankind prepared by the International Law Commission is explicit in this regard. The relevant articles read:

[19]J.B. Scott (Ed.), *Resolutions of the Institute of International Law*, New York, 1916, p. 12.

[20]C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Second Edition, Vol. 1, Boston, 1945, p. 723.

[21]For text see UN Secretary-General's report on the question of defining aggression, *GAOR*, VII, Am., Item 54, pp. 17-86, Doc. A/2211.

[22]*Ibid.*

[23]Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, London, 1958, pp. 201-2.

(4) The organization, or the encouragement of the organization, by the authorities of a State of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.[24]

Article 4 of the draft thus prohibits the organization, encouragement, participation, or the toleration thereof, of armed bands for incursions into another State. The responsibility is not only total in all its manifestations, but also criminal. Article 1 of the draft states categorically that the offences "defined in this code are crimes under international law, for which the responsible individuals shall be punished."

The provisions contained in Articles 5 and 6 deal with what has come to be recognized as "indirect aggression," or "subversive intervention" as Professor Quincy Wright named it.[25] Dealing with the problem of defining aggression he suggested that aggression under modern international law includes "failure of a government to prevent armed bands or insurgents from organizing within its territory to engage in hostilities across a frontier will make it responsible for aggression, if such hostilities actually occur."[26]

The question of indirect aggression—or subversive intervention—has received only fleeting reference in the literature on the subject.

[24]See for text *AJIL*, Supp. Vol. 49, 1955, pp. 21-2.

[25]Quincy Wright, "Subversive Intervention," *AJIL*, Vol. 54, 1960, pp. 521-35.

[26]Quincy Wright, "The Prevention of Aggression," *AJIL*, Vol. 50, 1956, pp. 514, 527.

De Martens, for example, wrote in 1883: "Each State has a right to require that foreign powers shall not incite the people of its territory to raise against it."[27] And Stowell flatly asserts that "no State would be justified in inciting a subject people to revolt against existing wrongs or inveterate abuses."[28] He condemns inciting disaffected elements in a neighbour's territory to rise in revolt, as a violation of international law. Thus the rule against subversion has been recognized even by classical writers in international law, namely, that each State has a duty to refrain from spreading propaganda and the like in a friendly country hostile to the latter's government.

The content of subversive activity, however, has to be assessed in accordance with the degree of probability of its effect. The test originally applied was a limited version of Justice Holme's *clear and present* danger rule.[29] That is to say, if such activity *prima facie* indicates a clear and present danger to the local government independent of the probability of its success, the foreign power sponsoring such activity commits an international delict. The stage-by-stage development in the field of municipal law from the clear and probable danger test to the Holmesian clear and present danger test, and then to the radical test of clear and imminent danger, is less clearly marked in the field of international law. What really matters here is not the probability of its success but its end, its purpose, and its goal.

The test should be what Thomas and Thomas call the "end-purpose" one.[30] On this test if a hostile propaganda or subversive activity is aimed at overthrowing a foreign government, the former not meant for local consumption, it stands prohibited.[31]

[27]De Martens, *Traite de Droit International*, Vol. 1, Sec. 74, Paris, 1883, p. 393. (Translation ours.)

[28]Stowell, *Intervention in International Law*, Washington, 1931, pp. 125, 353.

[29]*Scheneck* v. *US*, *249 US* (*1919*), p. 47.

[30]Thomas and Thomas, *Non-Intervention*, Dallas, 1956, p. 277.

[31]*Ibid.*, p. 277; also Quincy Wright, "The Crime of War Mongering," *AJIL*, Vol. 42, 1948, p. 128; Lawrence Preuss, "International Responsibility for Hostile Propaganda against Foreign States," *AJIL*, Vol. 28, 1934, p. 649; Vernon Van Dyke, "The Responsibility of States for Hostile Propaganda," *AJIL*, Vol. 34, 1940, p. 58; and B.S. Murty, *Propaganda and World Legal Order*, New Haven, 1968, *passim.*

That, *in fine*, is the position under international law of armed raids of private persons with or without government collusion, and hostile propaganda aimed at inciting civil strife, rebellion, or *coup d'etat*. On all these scores the Government of Pakistan could be found guilty, as is shown in Chapter One. Now let us look at the United Nations Charter to see if it permits the particular kind of use of force for such purposes by one member against the other.

USE OF FORCE AND THE UN CHARTER

The principal purpose of the Charter has been to make a distinction between permissible and non-permissible coercion and to establish the institutions and procedures that are indispensible and appropriate for sustaining that distinction. The Charter indicates, in broad strokes, the level of coercion that is sought to be prohibited and permitted.

The key provision in this connexion, Article 2, paragraph 4, reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The circumstances of permissive coercion are contained in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security....

The broad and vague terminology used in the above provisions of the Charter has given rise to a sharp cleavage of juristic opinion. As regards the prohibition of Article 2, paragraph 4, a powerful section of legal authority holds that armed force is prohibited except by way of self-defence or under authorization of a competent organ

of the United Nations.[32] Another school of thought holds that the use of force which is not against the "territorial integrity" or "political independence" of States or which is not "inconsistent with the purposes of the United Nations" is not prohibited by the Charter.[33]

Juristic authority varies, again, on the interpretation of Article 51. Some writers argue that this article limits the customary right of self-defence to cases of armed attack;[34] while others contend that Article 51 does not affect the customary right of self-defence and that it covers imminent attack.[35] Statesmen have taken varied stands in the political organs of the United Nations on the range and meaning of both the articles.[36]

Whatever the interpretative argumentation it is clear that the UN Charter prohibition of threat to peace, breach of peace, or act of aggression cannot be so limited as not to include hostile and injurious activities of private persons against foreign States.

[32]Hans Kelsen, *The Law of United Nations*, London, 1950, p. 708; C.H.M. Waldock, "Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours*, Vol. 81, 1952-II, pp. 455-514; Oscar Schachter, *Annual Review of United Nations Affairs*, New York, 1952, pp. 190-213; Louis Henkin, "Force, Intervention, and Neutrality in Contemporary International Law," *Proceedings, ASIL*, 1963, pp. 147-63; and Quincy Wright, *International Law and the United Nations*, Bombay, 1960, pp. 77-105.

[33]Julius Stone, *Aggression and World Order*, London, 1958, p. 95; McDougal and Feliciano, "Legal Regulation of Resort to International Coercion: Aggression and Self-Defence in Policy Perspective," *Yale Law Journal*, Vol. 68, 1959, pp. 1057-1165.

[34]See Ian Brownlie, "The Use of Force in Self-Defence," *BYIL*, Vol. 37, 1961, pp. 183-268; W. Eric Becket, *The North Atlantic Treaty and the Charter of the United Nations*, London, 1950, p. 13; Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," *AJIL*, Vol. 41, 1947, pp. 872-9; Philip C. Jessup, *A Modern Law of Nations*, New York, 1952, p. 166; Richard A. Falk, *Law, Morality, and War in the Contemporary World*, New York, 1962, p. 15.

[35]See Waldock, *op. cit.*, p. 498; D.W. Bowett, *Self-Defence in International Law*, Manchester, 1958, p. 188; Julius Stone, *Legal Controls of International Conflict*, New York, 1959, pp. 243-6; Kaplan and Katzenbach, *The Political Foundations of International Law*, New York, 1961, p. 211 ff.; McDougal and Feliciano, *op. cit.*, pp. 1146-7.

[36]See, for a succinct exposition, Rosalyn Higgins, "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice," *BYIL*, Vol. 37, 1961, pp. 269-329; M.K. Nawaz, "The Doctrine of Outlawry of War," *Indian Year Book of International Affairs*, Vol. 13, 1964, pp. 96-111.

Armed raids across international boundaries, including cease-fire lines, by one member against the other are a clear breach of the Charter law. They not only constitute an employment of armed "force" within the meaning of paragraph 4 of Article 2, but also fall within the requirement of the "territorial integrity or political independence" clause of that provision. It needs no special emphasis to show that armed raids across international boundaries are certainly "inconsistent with the Purposes of the United Nations" (Article 2, paragraph 4). For, the primary purpose of the Charter is not only to prevent the "scourge of war" but also "to suppress acts of aggression."

Professor Quincy Wright distinguishes "aggression" from "subversive intervention" to include in the latter hostile propaganda, infiltration, or subversion. According to Professor Wright, prohibition by the Charter of the threat or use of force cannot be construed to include "subversive intervention," which is prohibited by international law. But then he has in mind under this category "utilizing radio waves and other forms of communication, infiltrating into the government and political organization, and directing minority parties committed to their doctrines, to influence the domestic politics of a State in such a way that a small minority can gain control of the government contrary to the wishes of most of the population."[37]

Professor Wright goes on to prove that even such subtle forms of subversive interventions are contrary to the general principles of international law. He cites, *inter alia*, the UN General Assembly resolutions which deal with the subject. Since the same resolutions also include armed interventions of the crude variety we might as well cite them to prove our point here.

UN RESOLUTIONS

The United Nations has time and again recognized and affirmed that governments are under an obligation not to engage in hostile activities and propaganda, with the intent or likelihood of inciting sedition or revolt against the governments of other States. On

[37]Quincy Wright, "Subversive Intervention," *AJIL*, Vol. 54, 1960, p. 530.

3 November 1947, the General Assembly of the United Nations passed a resolution "condemning all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression."[38] On 1 December 1949, it called upon every nation "to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State."[39] On 17 November 1950, it "solemnly reaffirmed" that "whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign power, or otherwise, is the gravest of all crimes against peace and security throughout the world."[40]

The above UN General Assembly resolutions only reaffirm the general principles of modern international law which prohibit aggression by whatever weapons or means, and seditious activity by one State (official or unofficial) against another.

CONCLUSION

The foregoing pages show clearly that both in 1948 and 1965 the Government of Pakistan had committed an act of aggression by organizing, encouraging, participating, and tolerating on its territory hostile elements variously called *mujahids* and *faridins* whose aim was to commit acts of hostility, foment civil strife and overthrow the lawfully established government in the State of Jammu and Kashmir. On both occasions the surreptitious despatch of the so-called volunteers was denied at first but admitted later. And on both occasions the United Nations through its subordinate organs (UNCIP, UNMOGIP) testified to the crossing of such armed personnel on a massive scale across the boundaries, thus openly violating the established rules of traditional international law and the principles of the Nuremberg Charter.

[38] *UN Weekly Bulletin*, 11 November 1947, p. 618.

[39] UN "Essentials of Peace" Resolution, No. 290 (IV), *GAOR*, Plenary Meeting No. 261, 1 December 1949.

[40] UN "Peace through Deeds" Resolution, No. 380 (V), *GAOR*, Plenary Meeting No. 308, 17 November 1950.

"War," said the Nuremberg Tribunal, "is essentially an evil thing.... To initiate a war of aggression ... is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[41] The Nuremberg principles were unanimously affirmed by the UN General Assembly as "principles of international law"[42] and were subsequently codified by the International Law Commission as offences against peace and security of mankind.[43] The International Law Commission urged that the perpetrators of such offences "shall be punished."

The tragic irony of the state of international criminal law is that, while the vanquished powers can be subjected to the sanctions thus envisaged, the victorious go unpunished. Paradoxically, the United Nations helps indirectly in the latter process by stopping the hostilities prematurely and treating the law-breaker on an equal footing with the victim of aggression. Suffice it to say here that whatever be the deficiencies in the law-enforcement machinery there is no doubt as for the existing law on armed infiltration across State boundaries. And Pakistan twice violated this law.

[41]"Opinion and Judgement," *Nazi Conspiracy and Aggression*, 1947, p. 16.

[42]UN General Assembly Resolution No. 95 (I), *GAOR*, 1st Session, Plenary, 1946, p. 55.

[43]See for text *AJIL*, Supp. Vol. 49, 1955, pp. 21-2.

CHAPTER THREE

ROLE OF THE SECURITY COUNCIL IN THE PREVENTION OF AGGRESSION

AS ESTABLISHED in the previous two chapters the complicity of the Government of Pakistan in the organization of armed raids for purposes of armed hostility in Kashmir, attested to by an impartial observational organ of the United Nations, and the later involvement of Pakistan by open support and participation, was clearly contrary to the general principles of international law and was a breach of the letter and the spirit of the UN Charter. Though the Government of India in its original complaint of 1 January 1948 characterized the hostile acts of Pakistan as "aggression" which it has consistently maintained ever since, and though the Security Council's own mediator, Sir Owen Dixon, affirmed that the tribal invasion was contrary to the principles of international law, the Security Council persisted in refusing to countenance this fundamental factor in the dispute over Kashmir. Can the Security Council maintain such an attitude? An examination of this question leads one back to the eternal dilemma of determination of guilt in a war.

The question of war as a means of settling international disputes has attracted great controversy among jurists and statesmen for the last five centuries. Grotius and his followers advocated the theory of *bellum justum*, i.e. war was prohibited in inter-State relations except when the cause was just (the just cause defined as self-defence, remedying of wrong, or punishment of crime).[1] But

[1]Like all theories the doctrine of *bellum justum* had its forbears, the lineage reaching up to Hammurabi, Moses, the Greek Stoics, Cicero, the electic Roman lawgivers, Saint Augustine, and the Church Fathers. See, apart from the standard textbooks, Nussbaum, *A Concise History of the Law of Nations*, Revised Edition, New York, 1954, pp. 35-9; Philip C. Jessup, "A Half-Century of Efforts to Substitute Law for War," *Recueil des Cours*, Vol. 99, 1960-61,

Grotius ran into difficulties at the stage of application of the consequent principle *bellum legale*. One of those was that when nations go to war there were no *indicia externa*, no outward signs, to show other nations which of the belligerents had the right on its side. Commenting on the failure of Grotius to find the *externa indicia* of *bellum injustum*, Professor Brierly remarked that Grotius was looking for them in vain, "for in an unorganized world they do not exist and they cannot be created."[2]

The growing emphasis on the new-found national sovereignty during and after the sixteenth century, coupled with the difficulty of identifying the external *indicia* of an unjust war, inexorably led to the gradual abandonment of efforts to control the institution of war as such. The efforts, however, to control violence *durante belli* continued unabated. Grotius deplored the "lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no excuse at all, and that when arms have been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly let loose for the committing of all crimes."[3] Thus, while by the end of the nineteenth century it came to be recognized that war was a sovereign prerogative of States, it also marked the culmination of efforts to regulate the conduct of hostilities. The Hague Conferences of 1899 and 1907 were largely such endeavours.

The utter devastation in World War I forced the pilots of human destiny to a thorough heart-searching in regard to the institution of war. The Covenant of the League of Nations was a conscious effort to eliminate the causes of war. An enforcement machinery with limited scope of action was set up therein. With the Kellogg-Briand Pact of 1928 the circle took a full turn. War was abandoned as an instrument of national policy. And the UN Charter

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pp. 1-20; M.K. Nawaz, "The Doctrine of Outlawry of War," *IYBIA*, Vol. XIII, 1964, pp. 80 ff.

[2]J.L. Brierly, "The Prohibition of War by International Law," a paper presented for discussion to an inter-allied conference of lawyers held on 10-12 July 1943, reprinted in Richard A. Falk and Saul H. Mendlovitz (Ed.), *The United Nations* in *The Strategy of World Order* series, New York, 1966, pp. 454-70.

[3]Hugo Grotius, *De Jure Belli ac Pacis Libri Tres, Prolegomena*, Washington D.C., 1925, p. 20.

completed the process by prohibiting even the threat thereof.

It is arguable whether the League Covenant, or the Peace Pact of Paris, or the Charter of the UN restored the *bellum justum* doctrine in international relations.[4] It is sufficient to record here that the employment of armed force in international relations has been forbidden by these three instruments to which almost all the States of the world were, or are, contracting parties. In essence, however, the above three enactments do embody and try to remedy the *raison d'etre* of the doctrine of *bellum justum*, namely, that war was an evil, which in a disorganized world could not be controlled.[5]

As pointed out by Professor Quincy Wright in 1936, "with the post-war efforts at world organization, the *jus ad bellum* again became predominant but with a concept which no longer attempts to distinguish between the justice or injustice of the belligerent's causes but, instead, attempts to distinguish between the facts of aggression or the fact of defence."[5a] Now that it is established that the modern equivalent of the Grotian dilemma is the determination of "aggression" or "self-defence," it must be seen whether the UN contains a sufficiently organized machinery to locate the same and whether it fulfils Brierly's requirement of an "organized world order."

II

"The dramatic weakness of traditional international law," wrote Philip C. Jessup in 1946, "has been its admission that a state may use force to compel compliance with its will. This weakness has been the inevitable consequence of two factors—one, the concept of absolute sovereignty, and, two, the lack of a well-developed

[4]See Jaochim von Elbe, "The Evolution of the Concept of the Just War in International Law," *AJIL*, Vol. 33, 1939, pp. 673-4; Hans Kelsen, *Principles of International Law*, Second Edition (Revised and Edited by Robert W. Tucker), New York, 1966, pp. 31-3; Josef L. Kunz, "Bellum Justum and Bellum Legale," *AJIL*, Vol. 45, 1951, pp. 528-34.

[5]For an analysis of the League Covenant and the Paris Pact, see Quincy Wright, "The Meaning of the Pact of Paris," *AJIL*, Vol. 31, 1937, pp. 39-61.

[5a]*Ibid.*, p. 55.

international organization with competent powers." And, evidently with the establishment of the UN in mind, he declared: "Both of these factors are losing their old significance."[6]

The UN, which symbolizes these two trends, proceeds to impinge upon the absolute nature of sovereignty of member-States by making them subject to extensive obligations. The members agree to "settle their international disputes by peaceful means,"[7] to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,"[8] to "give the United Nations every assistance in any action it takes,"[9] and to "fulfil in good faith the obligations assumed by them in accordance with the present Charter."[10] Thus is surrendered the most sensitive segment of sovereignty—the right to wage war to compel compliance. The vacuum is filled by a supra-national body, the Security Council:

> In order to ensure prompt and effective action by the United Nations its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[11]

Complementary to these principal provisions is the scheme for peace-enforcement. "To maintain international peace and security," the UN is "to take effective collective measures."[12] The scheme is fully laid out in Chapter VII of the Charter. Article 39 empowers the Security Council to determine the existence of any threat to peace, breach of peace, or act of aggression and to make recommendations, or decide itself, to take measures in accordance

[6]Philip C. Jessup, "Force under a Modern Law of Nations," *Foreign Affairs*, Vol. 25, 1946-47, p. 91.

[7]Article 2, paragraph 3, of the Charter.

[8]Article 2, paragraph 4.

[9]Article 2, paragraph 5.

[10]Article 2, paragraph 2.

[11]Article 24.

[12]Article 1, paragraph 1.

with Articles 41 and 42. Article 40 provides for "provisional measures" to end hostilities. Article 41 prescribes enforcement action not involving the use of armed force. Article 42 empowers the Council to resort to armed force to suppress breaches of peace. Article 48 authorizes the Council to decide if all or some of the members should take part in such enforcement measures. The armed forces are to be made available to the Security Council through special agreements under Article 43, and the Council has powers to dispose of these contingents under Article 47.

In this way a centralized direction of force was created. But it was fully realized that "between the moment the illegal attack starts and the moment the centralized machinery of collective security is put into action, there is, even in the case of its perfectly prompt functioning, a space of time, an interval, which may be disastrous to the victim."[13] Hence, use of private force was permitted as an extraordinary and temporary measure under Article 51.

The scheme ran into the rough and tumble of the postwar developments. The Security Council failed to function as fashioned. This frustration of the scheme prompted member-States to search for alternative peace-keeping arrangements. The void was filled by the General Assembly, the potentialities of which were tapped through the *Uniting for Peace Resolution.*[14] The Charter of the United Nations, thus, both in schematic conception and in subsequent development, visualizes the creation of an orderly world community. This is not to say that the UN is a world government or a super-State, but by proscribing use of force save in common interest, by establishing a centralized direction of force, and by binding its members to the specific means of settlement it creates a regime of law which certainly would not warrant the characterization of the world community as "disorganized."

[13]Hans Kelsen, "Collective Security and Collective Self-Defence under the Charter of the United Nations," *AJIL*, Vol. 42, 1948, p. 785.

[14]See for legal bases of the Uniting for Peace Resolution, Hans Kelsen, *Recent Trends in the Law of the United Nations*, London, 1951, p. 975; Myres S. McDougal and Richard N. Gardner, "The Veto and the Charter: An Interpretation for Survival," *Yale Law Journal*, Vol. 60, 1951, p. 258; L.H. Woolsey, "The Uniting for Peace Resolution of the United Nations," *AJIL*, Vol. 45, 1951, p. 29.

III

Now let us see if the Security Council, the organ that is entrusted with the maintenance of international peace and security, is enjoined to pronounce upon the threat to peace, breach of peace, or act of aggression. This will solve the Grotian dilemma as to the absence of an international authority to ascertain and pronounce upon the *indicia externa*. For, if the Security Council is found to possess such powers the world community to a large extent might be said to have attained a high degree of sophistication. Article 39 of the Charter states:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

One can clearly see that this article does not provide any external *indicia* for the Security Council to determine the various gradations of danger to the peace of the world. But it does give to the Security Council a power, to characterize a particular act of a State as a threat to peace, breach of peace, or act of aggression. The absence of the ground rules to do so, however, has given rise to the impression that the place of law in the recommendation-or-decision-making authority of the Council under Article 39, or more generally under Chapter VII, was only minimal. Invoking this opinion Professor Clyde Eagleton, for instance, maintained that "the Security Council was not restricted to legal principles, solutions, and procedures; security was set above justice, and the establishment of order was to precede the reign of law."[15] It would be shown in this section that this is an erroneous view.

The decision of the framers of the United Nations Charter to leave such terms as "threat to the peace," "breach of the peace," and "act of aggression" ambiguous and comprehensive was a deliberate one. Proposals were submitted by Bolivia and the Philippines

[15]Clyde Eagleton, "The Jurisdiction of the Security Council over Disputes," *AJIL*, Vol. 40, 1946, p. 513.

to Committee 3 of the Third Commission of the San Francisco Conference for inserting an enumerative definition of aggression in the Charter. The Bolivian proposal, incidentally, had as one of its criteria of aggression: "(*d*) Support given to armed bands for the purpose of invasion." The Philippine proposal, likewise, recognized as aggression, "supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation."[16] This was advocated as a means of facilitating, in certain defined circumstances, the finding of aggression.

Though there was considerable support to the above proposals, as the rapporteur Paul-Boncour stated, "it nevertheless became clear to a majority of the Committee that a preliminary definition went beyond the possibilities of this Conference and the purpose of the Charter." The Dumbarton Oaks text was, therefore, adhered to and the Council was left with "the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression."[17]

The immediate question that arises is: Is the Security Council free to choose its own criteria, rely upon its own means of information, to "determine" the existence of danger to world peace? The competence of the Council in this matter is limited by the provisions of the Charter. Paragraph 2 of Article 24 lays down in part: "In discharging these duties [responsibility for the maintenance of international peace and security] the Security Council shall act in accordance with the purposes and principles of the United Nations."

Article 25 states that the members of the UN "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The primary purpose of the organization, according to Article 1, is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the supression of acts

[16]See for the text of the proposals, *UNCIO Documents*, Vol. 3, pp. 538, 584.
[17]*UNCIO Documents*, Vol. 12, p. 505.

> of aggression or other breaches of the peace, and to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[18]

Again, paragraph 3 of the same article stipulates: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, *and justice*, are not endangered."[19]

This is in addition to the preambular references to the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; and to the General Assembly's function under Article 13 to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

To buttress the belief that the above references to "law" and "justice" are not rhetorical flourishes, ample evidence can be drawn from the whole scheme of the Charter. The Charter, as shown in the earlier section, outlaws war and obliges members to settle their disputes by peaceful means. Chapter VI on the "Pacific Settlement of Disputes" specifies judicial settlement and recourse to the International Court of Justice as approved methods of dealing with international differences. This time an organic link is created between the UN and the World Court by making the latter's statute incorporated as part of the Charter, which was not so in the case of the Permanent Court of International Justice and the League of Nations. The statute includes a provision which would in effect enable the Security Council to take action to enforce a judgment of the Court on the event of a failure to comply with it.[20] Moreover, the Charter itself being a legal instrument, a multipartite treaty, its interpretation and application should be based on principles of international law.[21] It is almost universally ack-

[18]Italics ours. [19]Italics ours.

[20]See G.G. Fitzmaurice, "The United Nations and the Rule of Law," *Transactions, Grotius Society*, Vol. 38, 1953, pp. 135-50.

[21]Oscar Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat," *BYIL*, Vol. 25, 1948, p. 92.

nowledged now that though the Security Council is a political body it is "nonetheless bound by legal rules—rules which are both specific, reflecting formal consent to the terms of the Charter, and general, being the rules of general international law."[22]

What then is the source of misunderstanding about the place of law in the decision-making powers of the Security Council. This must be attributed to the atmosphere of acute political realism that prevailed at the earlier phases of the drafting of the Charter.[23] The evaporation at the end of World War I of the spirit of Alabama Arbitration, if one might say so, ushered in a crescendo of international lawlessness during the League era which brought about in the popular mind the other extreme of losing all faith in the efficacy of international law. In this atmosphere it is no wonder that the Dumbarton Oaks Proposals contained no reference to law and justice except once in connection with the protection of national sovereignty against international law. Peace and security and not international law were the canons of faith.

Ironically it was the Chinese and the South African governments—virtually isolated today at the UN—which were responsible for the references to international law in the Charter. The Chinese delegation put forward the proposal that the "Charter should provide specifically that adjustment or settlement of international disputes should be achieved with due regard for the principles of justice and international law," which was accepted by the other great powers. Field-Marshal Smuts of South Africa issued an inspiring appeal to proclaim in the Charter the faith of the United Nations in the peace of justice and honour and fair-dealing as between man and man, as between nation and nation.[24]

At the San Francisco Conference there was sharp criticism offered by small States against the "realist" spirit of the Dumbarton Oaks Proposals. Various delegations felt that the phraseology of the Proposals must be strengthened by "more positive references

[22]Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, London, 1963, p. 2.

[23]See M. Chakste, "Justice and Law in the Charter of the United Nations," *AJIL*, Vol. 42, 1948, p. 590 ff.; Bin Cheng, "International Law in the United Nations," *YBWA*, Vol. 8, 1954, pp. 171-95.

[24]*UNCIO Documents*, Vol. 1, p. 426.

to the obligation of strict observance of international law and justice by all states as prerequisite to the primary end of the organization for maintaining peace and security."[25] Several amendments to this end were put forward, and if nothing more could be done it was not because of lack of enthusiasm for law but owing to the rules of procedure, according to which a two-thirds majority was required for an amendment to be carried.[26]

There were clear indications at the end of the San Francisco Conference that the abundant discretion given to the Security Council, in matters affecting peace and security, did not include the power to neglect principles of international law.[27] If that was the feeling and understanding of the framers of the Charter the overplaying of the political element in the decision-making power of the Security Council must be attributed to what Fitzmaurice described as the Conciliators and the Idealists.[28] The Conciliators, according to Fitzmaurice, are those who are sincerely convinced that the only settlement worth having is an agreed or negotiated settlement, brought about by a process of conciliation or persuasion exercised in respect of the parties, if necessary without much regard to the rights and wrongs of the matter. Since a legal settlement usually involves, in one form or another, a finding for one party and against the other, or else a finding that one of the parties is right and the other wrong, it does not suit the conciliator. His aim is to bring the parties together, not to find out which of them is in the right.[29]

Though the method of the conciliator is very useful, yet it cannot serve as the key to the solution of all international disputes. Professor Fitzmaurice warned that even if a settlement by agreement is possible, a satisfactory and above all a lasting solution is seldom achieved if important underlying issues of a legal character are unresolved: "Conciliation is not an adequate method *per se* of

[25]*Ibid.*, Vol. 6, p. 282.

[26]See Chakste, *op. cit.*, p. 592.

[27]*Ibid.*, pp. 596-7.

[28]G.G. Fitzmaurice, *op. cit.*, p. 143.

[29]See the Malayasian representative's repeated assertions on the resolutions, introduced on 4 and 6 September 1965, "that the draft resolution makes no findings; it produces no judgements" on the basic issues. (S/PV 1237, p. 77 and S/PV 1238, pp. 3-5.)

dealing with international issues, if coupled with a neglect of the legal elements involved in those issues."[30]

Finally, the idealist—the most dangerous of all—obsessed by the notion of justice is prepared to sacrifice the rule of law. "Let us look at the facts of each particular case," says the idealist, "and do what seems just and right in the light of those facts, and let us not bother about the application of legal rules and principles." This kind of attitude, as Fitzmaurice rightly points out, is profoundly mistaken, and in the long run self-defeating. For, the empirical, *ad hoc*, and subjective yardstick likely to be employed to achieve justice is prone to be inadequate:

> Justice is very seldom achieved by directly aiming at it: rather it is a byproduct of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular and systematic application of known legal rules and principles, even if these rules and principles are not always and do not always achieve ideal results in every case.[31]

CONCLUSION

The above analysis shows that though the Security Council has been given wide authority to handle situations involving threat to peace, breach of peace, or act of aggression, according to its political discretion, it does not give the Council the power to ignore legal principles of a fundamental character in the issue. The decision-making and recommendatory power of the Security Council is circumscribed by the provisions of the Charter, which enjoin upon it to act in accordance with the principles of international law and justice.

A word on the persistent appearance of "justice" along with "international law" in the Charter might be apposite. The logic

[30]Fitzmaurice, *op. cit.*, p. 144.

[31]*Ibid.*, p. 147. Fitzmaurice cites approvingly Dr. Kerno (Assistant Secretary-General in charge of UN Legal Department): "Legal techniques are the best means which mankind has yet devised for arriving at justice, and decisions must be taken on a basis of general principles rather than expediency" (p. 148).

of Fitzmaurice quoted above (namely, that justice is the byproduct of the application of legal rules and that in the interest of certainty and stability reliance on known legal rules is much better for lasting results, even if they are not perfect and ideal) is irrefutable. Especially it is so in an organization primarily concerned with the maintenance of international peace and security rather than dispensing justice. The world community is not advanced enough for the equation of law with justice. Even in advanced national legal systems it cannot be said that the two concepts have achieved harmony. In an organization whose fiat extends only to the maintenance and restoration of peace, and which enjoys only persuasive powers in the field of dispute-settlement the concept of justice can hardly be any more than a mere sentiment.

The collective refusal of the Security Council, as shown in Chapter One, to countenance the principle of international law raised by India repeatedly and the individual expressions of unwillingness by delegations to go into the question of legality or otherwise of Pakistani abetment and involvement in the armed raids across the borders was thus based on a faulty understanding of the letter and the spirit of the Charter.

This gave rise to some important consequences in the way of effectiveness of the UN in the whole question. Firstly, it led to a deadlock over disengangement, which is dealt with in the following chapter. Secondly, it affected adversely the so-called basic issues underlying the Kashmir problem. This aspect is taken up in the later part of the study.

CHAPTER FOUR

COERCIVE PERSUASION AND DEADLOCK OVER DISENGAGEMENT

THE SECURITY COUNCIL resolutions of 4 September 1965 and 6 September 1965 called upon India and Pakistan to cease-fire and to respect the cease-fire line, and entrusted the Secretary-General the task of giving effect to the resolutions. The immediate objective of these resolutions was to bring the hostilities to an end without going into the background of the hostilities or to take up the old issue of the Kashmir problem as such. The members were firmly of the belief that it was no time to deal with the "basic issues" as the Pakistan delegation called it. Hopes were expressed, however, that once peace in the subcontinent was established the two nations will find out a mutually acceptable solution to the Kashmir problem.

The interest, nevertheless, at this stage was to lend the authority of the Security Council to strengthen the hands of the Secretary-General in securing an end to the hostilities. Goldberg, in his capacity as the Permanent Representative of the United States, gave expression to this feeling when he said of the efforts of the Secretary-General:

> It is of the highest importance to the cause of world peace and security, and indeed to the cause of the Charter, which is dedicated to these great principles, that the Security Council must clearly and unequivocally place its great authority behind these grave appeals, and we pray that the parties involved will hear our voices and draw back from the catastrophe which threatens.[1]

So, when the Secretary-General announced on 6 September after the adoption of the second resolution that he would pay a visit to

[1]S/PV 1237, 4 September 1965, pp. 107-10.

the subcontinent, there was a general and spontaneous appreciation of such a course amongst the delegates.[2] Little was it realized, though, how onerous a job it was for the Secretary-General to compel compliance to these resolutions.

The phraseology of the resolutions (*calling upon* parties to end hostilities) was not exactly mandatory. Moreover, its non-committal tenor over the issue of a clearly established use of force of one party could hardly carry any weight in the eyes of the victim (India). For Pakistan, since the resolutions did not take note of, or provide for the settlement of, basic issues, to keep alive which it had taken the extreme step of subversive intervention, the Security Council resolutions were likewise unsatisfactory. In such a state of affairs the Secretary-General embarked upon his crucial journey to the subcontinent. The fruits of his labour were not unexpected.

In his preliminary report on his talks with the leaders in the subcontinent, the Secretary-General noted the Indian and Pakistani response to his peace efforts this way:

> Prime Minister Lal Bahadur Shastri: "In deference to the wishes of the Security Council and to the appeals which we have received from many friendly countries, we accept your proposal for an immediate cease-fire. We would, therefore, be prepared to order a cease-fire effective from 6.30 A.M., Indian standard time, on Thursday, 16 September 1965, provided you confirm to me by 9 A.M. tomorrow that Pakistan is also agreeable to do so."[3]
>
> "I reaffirm my willingness, as communicated, to order a simple cease-fire and cessation of hostilities as proposed by you, as soon as you are able to confirm to me that the Government of Pakistan has agreed to do so as well. The actual time when the cease-fire would become effective would depend upon the time when you are able to convey to me the agreement of the Government of Pakistan to a cease-fire."[4]
>
> President Ayub Khan: "I am fully conscious of the gravity

[2]See S/PV 1238, 6 September 1965, pp. 40-52.

[3]S/6683, para 8, 16 September 1965; *SCOR*, 20th year, Supp. for July, August, and September 1965, p. 298.

[4]*Ibid.*, para 11, p. 302.

of the present situation and also of the dangers implicit in the catastrophe that threatens to engulf the subcontinent particularly because of the certainty that as time goes on the present conflict would be bound to assume graver and wider dimensions.

"However, a cease-fire can be meaningful only if it is followed by such steps as would lead to a durable and honourable settlement in order to preclude the recurrence of a catastrophe such as now threatens the subcontinent. To bring about such a settlement, it would be necessary to evolve an effective machinery and procedure that would lead to a final settlement of the Kashmir dispute."[5]

The basic difference between the attitude of India and Pakistan to the Security Council's call for a cease-fire was that while India was agreeable to drop the condition of an agreeable arrangement for the non-recurrence of the infiltration episode, Pakistan was insistent about the self-executory agreement on the "basic issues" of the problem. India, though willing for an unconditional cease-fire, nevertheless was demanding, as is evident from Chagla's statement before the Security Council on 17 September 1965, that all the invaders who had entered Kashmir must leave and that they be called back by Pakistan. And on the question of aggression Chagla was insisting on a decision, a conclusion, and a judgment.[6]

It is one thing to demand, while agreeing first on an unconditional cease-fire, action on the wrongdoer; and it is another to ask for a self-executing arrangement for the settlement of the political cause of the conflict, as a precondition for the order of cease-fire. The Indian stand would commit the Council to its right role and the Pakistani position would have meant recognition of a State's right to demand of the Council a dictatorial settlement, by creating deliberately a breach of peace.

The consensus of the members of the Security Council was far from condemnatory or comminatory. They were concerned first and last to deal effectively with the breach of peace. And when the parties did not yield the Secretary-General urged, in a personal appearance in the Council after his peace mission to the sub-

[5] *Ibid.*, para 14, p. 305.
[6] S/PV 1239, 17 September 1965, pp. 49-51.

continent, coercive action: "Order the two Governments concerned, pursuant to Article 40 of the Charter of the United Nations, to desist from further hostile military action and to this end to issue cease-fire orders to their military forces. The Council might also declare that failure by the Governments concerned to comply with this order would demonstrate the existence of breach of the peace within the meaning of Article 39 of the Charter."[7]

The second important recommendation that the Secretary-General made was to urge the Council to request "the two Heads of Governments to meet together at the earliest possible time to discuss the current situation and the problems underlying it as a first step in resolving the outstanding differences between their two countries and in reaching an honourable and equitable settlement."[7] The Council, said the Secretary-General, could also consider the possibility of creating and making available a small committee to assist in such talks should its services seem useful and desirable to the two parties.

Though this was not going all the way to meet the Pakistani condition, it did represent a definite shift in the attitude of the Secretary-General. He had not only dropped the condition in his earlier report requiring the Government of Pakistan "to take effective steps to prevent crossing of the CFL from the Pakistan side by armed men, whether or not in uniform,"[8] which reflected the Indian feelings to a large extent, but was giving in, to an extent, to Pakistani demand for a self-executing agreement on the settlement of political causes underlying the conflict. Chagla, the Indian delegate, was naturally resentful of the shift in the Secretary-General's attitude.[9]

Chagla challenged the Secretary-General's avowed impartiality between a party which according to his own report had violated the CFL, and the victim of such massive violations. He disproved the Secretary-General's statement that both governments had put conditions for a cease-fire unacceptable to the other, by citing the letters of the Prime Minister of India (offering unconditional cease-fire) and that of the President of Pakistan (demanding a self-

[7] *Ibid.*, p. 16.
[8] See S/6651, p. 9.
[9] See S/PV 1239, pp. 21-51.

executing machinery for the settlement of the Kashmir problem as a precondition).[10]

By reference to the Secretary-General's suggestion for the application of Article 40 to both the governments, Chagla exclaimed:

> Why two Governments? Why again bracket India and Pakistan together? We have not said no. Why do you say you should call upon India and Pakistan to desist from taking hostile action? . . . I say that the Council must call upon Pakistan to desist from carrying out hostilities, and I ask it, under Article 39 of the Charter . . . to determine . . . the existence of an act of aggression on the part of Pakistan.[10a]

As for the Secretary-General's suggestion that the Council ask the leaders of the two governments to meet to evolve a formula for the solution of the Kashmir problem (obviously, a suggestion to satisfy, in a way, the Pakistani insistence on self-executing machinery for the solution of the problem), Chagla maintained that "the Security Council should confine itself to the simple question of the cessation of the conflict and not mix up the political issue with this [withdrawals] issue at this juncture."[10b]

Following the shift in the attitude of the Secretary-General, and presumably in the light of the continuing hostilities on a wider and greater scale, an opinion gained ground in the Security Council which was more amenable to Pakistan. The first to voice this was Rifai of Jordan. He said:

> The Security Council will be prolonging the difficulties between India and Pakistan and perpetuating the dispute if it does not take serious and definite steps to resolve the question of Kashmir, which has proved to be the real cause of the unpleasant situation between the two sister States. I am afraid that we would be reducing the responsibilities of the United Nations to the minimum if we were to restrict them to the mere task of stopping the fighting. The responsibilities of the United Nations are much

[10] *Ibid.*, pp. 37-8. [10a] *Ibid.*, p. 48.
[10b] *Ibid.*, pp. 43-5.

greater and much higher than this. The responsibilities of the United Nations are mainly directed towards the settlement of the disputes which are the causes of fighting among nations.[11]

II

Rifai's concern for the lasting solution of the underlying political causes, laudable as it is, betrays lack of understanding of the schematic set-up of the UN and particularly of the competence of the Security Council. It is true that "the responsibilities of the UN are mainly directed towards the settlement of the disputes which are the causes of fighting among nations," but it is equally true that the competence of the UN in this field emanates from Chapter VI of the Charter and not from Chapter VII. Chapter VI authorizes the Security Council to employ conciliatory means to resolve international disputes. The Council can suggest or recommend terms of settlement, which inherently are non-binding. It cannot dictate solutions.

Even under Chapter VII, it is well known, the competence of the Security Council is not all-pervasive. It can make binding decisions only to the extent of warding off a threat to the peace, restoring a breach of the peace or suppressing an act of aggression. Its enforcement machinery, envisaged in Article 41 and 42, and its capacity to order provisional measures under Article 40, can be applied only against a member or non-member which refuses to stop being a threat to the peace, or refuses to restore the breach of peace, or refuses to desist from aggression. The Security Council cannot employ sanctions against a member which is not guilty of any of these acts.

That indeed is "reducing the responsibilities of the United Nations to the minimum," but that unfortunately is the competence of the Council. It is only competent through binding decisions to stop fighting. As for the underlying causes its competence lay in hortatory recommendations. And that precisely is the broderline, Rifai should have known, that distinguishes the UN from a World Government.

[11] S/PV 1241, 18 September 1965, p. 7.

In the debate that followed, Ramani of Malaysia challenged the assertion of the Jordanian delegate and pointed out that the Council was "not a court of law." The precondition of Pakistan for a purposeful cease-fire, said Ramani, had dangerous potentialities: "If a plebiscite or an understanding to have one is to be regarded as an essential prerequisite for a cease-fire, the logic of that argument would commit the Security Council to have secured for a State the happy position of providing a conflict so as to be able to secure a political profit from it."[12] He suggested, therefore, that the Security Council refuse to walk into that position and refuse to recall "ancient resolutions from the musty records of the past, nor to express pious hopes for a peaceful settlement in the future, not to be sidetracked from the main objective."[13] Ramani insisted thus that any further resolution must "(*i*) acknowledge India's ready acceptance of the Security Council's call for a cease-fire; (*ii*) regret Pakistan's conditional agreement on cease-fire; (*iii*) deplore the recourse to large-scale armed infiltrations; and (*iv*) call on Pakistan, not on India which had twice accepted the Secretary-General's proposal, to cease hostilities."[14]

Thereupon the unanimity of the Security Council was broken. And not until two days of continuous behind-the-scene diplomacy could the deadlock be resolved. On 20 September 1965 the Security Council adopted an important resolution, sponsored by de Beus of the Netherlands, by ten votes to none with Jordan abstaining. The preambular paragraphs of the resolution commendingly took note of the Secretary-General's efforts and reports of his peace mission and affirmed the conviction that an early cessation of hostilities was "a first step towards a peaceful settlement of the outstanding differences between the two countries on Kashmir and other related matters." The operative paragraphs were as follows:

[12] *Ibid.*, p. 21. Chagla of India, "echoing" Ramani, said later in the debate "that this would be a very serious thing for the Security Council . . . for international relations . . . for international peace, if Pakistan could get a settlement of the Kashmir problem, could get a plebiscite, at the point of a gun or bayonet. I call this blackmail. You invade a country . . . spread terror . . . bomb civilians . . . and then turn round and say: I agree to a cease-fire, provided you settle the problem of Kashmir and hold plebiscite in Kashmir." (*Ibid.*, pp. 76-7.)

[13] *Ibid.*, p. 21. [14] *Ibid.*, p. 27.

1. [The Security Council] *Demands* that a cease-fire should take effect on Wednesday, 22 September 1965, at 07.00 hours GMT and calls upon both Governments to issue orders for a cease-fire at that moment and a subsequent withdrawal of all armed personnel back to the positions held by them before 5 August 1965;

2. *Requests* the Secretary-General to provide the necessary assistance to ensure supervision of the cease-fire and withdrawal of all armed personnel;

3. *Calls on* all States to refrain from any action which might aggravate the situation in the area;

4. *Decides* to consider as soon as operative paragraph 1 of the Council's resolution 210 of 6 September has been implemented, what steps could be taken to assist towards a settlement of the political problem underlying the present conflict, and in the meantime calls on the two Governments to utilize all peaceful means, including those listed in Article 33 of the Charter, to this end;

5. *Requests* the Secretary-General to exert every possible effort to give effect to this resolution, to seek a peaceful solution, and to report to the Security Council thereon.[15]

The preambular reference to the problem of Kashmir and the *decision* to consider, after the cease-fire and withdrawal were effected, what steps could be taken to *assist* towards a settlement of the political problem underlying the conflict, are a far cry from Pakistan's condition of "a self-implementing plan . . . to bring about . . . a determination of the dispute."[16] Nevertheless, it was a little more than, what Ramani had called, an expression of a pious hope for a peaceful settlement of the dispute. For, Pakistan had been provided with a lever to get the Security Council kept engaged on the problem whenever it wished to. The recommendation in paragraph 4 of the resolution calling upon the two governments to utilize all peaceful means, including those listed in Article 33 of

[15]S/6694, 20 September 1965.

[16]Zafar's speech before the draft resolution was put forward, S/PV 1242, p. 11, and Bhutto's speech of 27 September 1965, S/PV 1245, pp. 17-8.

the Charter, again, falls short of the Pakistan condition. The Pakistan delegation had insisted that the Security Council itself evolve the self-executing arrangement, not that the matter be left to the wishes of the parties. In that limited sense both the parties agreed for a compromise. Pakistan was left free to bring the Kashmir question to the Council any time it wanted to on the simple plea that India had refused to hold talks on Kashmir or submit to precedures enumerated in Article 33 of the Charter. But if it is remembered that all member-States, even otherwise, have such a right directly or indirectly over any dispute, it is not much of a concession to Pakistan. The real victory, however, was that of India and Malaysia. They denied to Pakistan a political profit out of its armed conflict.

Another way of looking at the references to the so-called basic issues might be to regard them as a sort of exercise of the Security Council's own authority or role in this dispute. De Beus of the Netherlands who sponsored the resolution stated:

> It is a draft resolution which neither condemns nor condones; it deals with the past less than with the future; it does not try to look backward but forward; it does not assess fault to the parties, but offers assistance to them: assistance in supervising the carrying out of the cease-fire, and assistance in subsequent negotiations.[17]

That precisely is the role of the United Nations as far as dispute settlement is concerned, viz. persuasive. Coercive measures are envisaged in Chapter VII only to restore, suppress or maintain peace, and not to dictate solutions to international disputes. Thus, while the resolution used persuasive language on the dispute underlying the conflict, its language on the cessation of hostilities was authoritative. In the earlier resolutions the Council had, it will be remembered, used the word "calls upon," but in the 20 September resolution it used stronger language, viz. "demands." That, again, is consistent with the scheme of the Charter.

[17]S/PV 1242, p. 17.

III

The Preamble of the Charter of the United Nations speaks of the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This is a key provision for the appreciation of the present section of the study. In so far as the Charter is a multilateral treaty and a "source" of international law,[18] respect for the obligations arising therefrom is dependent upon the establishment of conditions conducive thereto. It is generally recognized that the Preamble is as much a part of the Charter as any other part therein.[19]

If it is accepted that the Charter envisages the creation of conditions conducive to the respect of obligations arising therefrom, it must follow that the Organization as a whole, and the Security Council in particular, is under an obligation to create such conditions for ensuring its primary object of maintaining international peace and security.

The conditions conducive to the maintenance of international peace and security are sought to be created, negatively, by the prohibition of force "save in the common interest" and by obliging the members "to practise tolerance and live together in peace with one another as good neighbours" (Preamble). This negative code of conduct, as seen in an earlier part of this study, is spelt out in detail in paragraphs 4, 5, and 7 of Article 2.

On the positive side the members are obliged to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Methods though outwardly pacific in nature (i.e. not involving the use of force) but likely to endanger international peace and security, and justice, are, according to this provision, not conducive to the conditions referred to above. Detailed methods for the pacific

[18] See Clive Parry, *The Sources and Evidences of International Law*, Manchester, 1965.

[19] See Hans Kelsen, *The Law of the United Nations*, London, 1951, pp. 9-12. "The Preamble is part of the Charter. Consequently it has virtually the same legal validity, that is to say, the same binding force as the other parts of the Charter" (p. 9).

settlement of disputes by the members as well as by the Organization are drawn out in Chapter VI. And when international peace and security is endangered the Charter provides for measures in the nature of sanctions[20] under Chapter VII. We would examine in a little more detail the scheme of the Charter pertaining to this aspect.

The powers of the Security Council in the field of maintenance of international peace and security and the settlement of disputes are derived from Article 24 and 25. Article 24 states, in part,

> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

Article 25 lays down: "The Members of the United Nation agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

These two articles, apart from the grant of authority to the Security Council by the members and the undertaking to abide by its "decisions," prescribe that the Council in the discharge of its duties shall "act in accordance with the Purposes and Principles of the United Nations" and arrive at decisions "in accordance with the present Charter." It was shown in the preceding chapter that the Security Council had overlooked a clearly established norm of traditional and Charter law in the discharge of its duties. Now it would be examined if its decisions in ordering an end to hostilities was consistent with the provisions of the Charter.

The Security Council discharges its duties of maintaining inter-

[20]See, for a lucid exposition of the concept of sanctions, Hans Kelsen, *Principles of International Law*, Second Edition (Revised and Edited by Robert W. Tucker), New York, 1966, pp. 18-86.

national peace and security by two methods: firstly, through the application of the provisions of pacific settlement of disputes as are likely to endanger international peace and security, and, secondly (on failure, presumably, of the first method), by taking enforcement action.

Chapter VI entitled "Pacific Settlement of Disputes" sets out the various means by which the Council may assist in the settlement of disputes and, as Article 33 states clearly, these methods are supplementary to those traditionally established in internanational law and which the parties must "first of all" utilize as appropriate. Also, it is with disputes "likely to endanger international peace and security" that the Council is concerned, and not with all disputes.

Under paragraph 2 of Article 33 the Security Council has been given the power to "call upon" the parties to settle their disputes by peaceful means enumerated in the preceding paragraph. Article 34 gives a discretionary power to the Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." It has been argued that this provision accords the Council a *power*, not a *right*, to investigate a dispute or situation.[21] But what matters in this context is that when once the Council creates a special organ, as it did in establishing the UNCIP through its resolution of 20 January 1948,[22] it cannot ignore the fundamental findings of such an organ. Unfortunately that is exactly what the Council chose to do. It deliberately ignored the occupation of the Northern Areas by Pakistan, while the Commission itself was present in the subcontinent. It ignored the consolidation and expansion of the so-called Azad Kashmir forces under the command of the Pakistan Army.

Article 36 authorizes the Security Council to "recommend appropriate procedures or methods of adjustment" at "any stage of a dispute." The same article enjoins the Security Council to refer as

[21]Earnest L. Kerley, "The Powers of Investigation of the United Nations Security Council," *AJIL*, Vol. 55, 1961, pp. 892-918.

[22]See Appendix II for the text of the resolution.

a "general rule" legal disputes to the International Court of Justice. Paragraph 2 of Article 37 empowers the Council, if it deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, to decide either to take action under Article 36 or to recommend such "terms of settlement as it may consider appropriate."

It is universally recognized that the methods enumerated above of pacific settlement of disputes are hortatory in character; and that the Security Council *cannot dictate terms of settlement.* It can only recommend appropriate procedures or methods of adjustment (Article 36) and such "terms of settlement as it may consider appropriate."

However, under Chapter VII of the Charter, the matter gets a little complex. If such methods of adjustment or terms of settlement recommended by the Security Council are not accepted by a party to the dispute then the Council might characterize such a situation as a threat to peace and take enforcement action under Articles 41 and 42. But before embarking upon such a course the Security Council is bound to "determine," under Article 39, the existence of a threat to peace, etc. It is doubtful if the Council can do so in a situation where a party refused to accept the terms of settlement recommended by the Council through non-binding resolutions, but does not violate Article 2, paragraph 4, i.e. does not use or threaten force.

To meet this difficulty the Security Council, under Article 40, can *call upon* the parties to a dispute to comply with such provisional measures as it deems necessary or desirable. But such measures "shall be without prejudice to the rights, claims, or position of the parties concerned." This makes it clear that the provisional measures envisaged under Article 40 are not in the nature of forcible settlement of disputes.

Article 41 empowers the Security Council to take measures not involving the use of armed force, and Article 42 envisages "action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." Neither of these articles empowers the Security Council to dictate solutions even to the guilty parties, let alone a victim of aggression.

The deduction from the above analysis, which is also borne out

by United Nations practice, is that while the UN can suppress breaches of peace or acts of aggression—maintain or restore international peace in the Charter terminology—it cannot establish lasting peace on the basis of compulsive settlement of disputes underlying the hostilities. Though the UN has been provided with the machinery in the nature of sanctions it has not been endowed with compulsory jurisdiction on disputes between States. This "gap" in the legal or political order of the UN is due to the fact that the international community has not yet attained the perfect stage of the regime of law as the national communities.

That is the reason why the UN adopts varying degrees and mixtures of coercive and persuasive language in its resolutions designed to maintain or restore international peace. As the resolutions in the first part of the chapter reveal, the UN, while being firm as far as ending hostilities is concerned (*calling upon* and *demanding* cessation of hostilities) offers its *good offices* and *assistance* for the solution of the political causes underlying the hostilities.

A great amount of dissatisfaction has been expressed on this limited role played by the UN, as can be seen from the statement of the Jordanian representative at the end of the first part of this chapter. But if it is remembered that the UN is not a super-State or a World Government the cause for concern will be minimized.

The UN might fail to accomplish even this limited role if it proceeds to restore peace ignoring the established norms of international law. The fighting might stop but there will be a deadlock over disengagement. The next section of this chapter will show that if the UN cannot "guarantee" prevention of aggressive acts and ignores or exonerates the dangers of indirect aggression and subversive intervention, the effectiveness of the UN might be limited further.

IV

The Security Council Resolution 211 of 20 September 1965 in its operative paragraph 1 demanded that, after cease-fire orders were issued by both the governments, "a subsequent withdrawal of all armed personnel back to the positions held by them before 5 August 1965" should take place. And in operative paragraph 2

the resolution requested the Secretary-General "to provide the necessary assistance to ensure supervision of the cease-fire and withdrawal of all armed personnel." The vicissitudes of the Secretary-General and the Security Council in implementing this objective reveal the sad inadequacies of the existing international organisation in meeting the power realities of international life today.

The Secretary-General submitted a series of reports to the Security Council on the observance of the cease-fire under the Council's resolution of 20 September[22a] and on the compliance with the withdrawal provision thereunder.[23] A simple cease-fire effected by the Security Council, oblivious of the fact of subversive intervention which sparked off the conflict, was unsatisfactory to the victim, i.e. India. And for Pakistan since it would only restore the *status quo*, which the Pakistan Government had openly admitted to be detrimental to them, it was equally unsatisfactory to Pakistan. This dissatisfaction was in evidence on the battlefront. The two armies began to consolidate their gains by digging up trenches for future action and started edging forward to strategic positions. In the process there were clashes of varying magnitude in different sectors.

The Secretary-General reported to the Security Council on 25 September 1965 that numerous complaints alleging violations of cease-fire were received by the UN Military Observers, confirming Pakistan troops firing at Uri-Punch road on 24 September. The other incident he referred to was the one in Lahore area where "both sides had opened fire."[24] The addendum to this report (1) dated 26 September conveyed a general deterioration in the whole Lahore sector. The Secretary-General said that in the Lahore sector "the cease-fire is not holding as of 26 September."[25] Reporting of Indian and Pakistani edging-forward, the Secretary-General concluded that observance of "the cease-fire and withdrawals are closely linked."[26]

[22a]S/6710 and Addenda 1 to 17 thereto between 25 September 1965 to 28 January 1966.

[23]S/6719 and Addenda 1 to 6 thereto between 27 September 1965 to 26 February 1966.

[24]S/6710, 25 September 1965.

[25]S/6710/Add. 1, p. 2, 26 September 1965.

[26]*Ibid.*, p. 3.

This led to another meeting of the Security Council on 27 September 1965. What transpired in that meeting is revealing. The President of the Council, Goldberg, presented to the Council a draft resolution which reflected, he said, "the concensus of the members on the basis of [his] consultations with them."[27] The resolution, noting in its preamble the reports of the Secretary-General,[28] reaffirming its previous resolutions, and expressing grave concern at the fact that the cease-fire was not holding, demanded "that the parties urgently honour their commitments to the Council to observe the cease-fire"; and further called upon "the parties promptly to withdraw all armed personnel as necessary steps in the full implementation of the Resolution of September 20."[29]

The resolution was adopted unanimously without discussion. It was then that Parthasarathi of India pointed out that this resolution should be addressed only to Pakistan, since from the very beginning Pakistan was opposed to an unconditional cease-fire. By reference to President Ayub Khan's letter of 13 September addressed to the Secretary-General, in which it was pointed out that insistence merely on cease-fire and withdrawal would amount to reverting to "the same explosive position which triggered the present conflict,"[30] and several other such statements, Parthasarathi established that Pakistan was keeping the battlefront hot in order to compel the Council to get engaged in evolving a formula on the Kashmir question. As a piece of evidence the letter of the Permanent Representative of Pakistan to the Secretary-General could be cited, part of which read:

> You appear to be concentrating almost exclusively on making arrangements for withdrawal of troops and re-establish the old cease-fire line in Jammu and Kashmir. In our judgement, however, military disengagement should proceed concurrently with an honourable political settlement.... Moreover, if immediate steps are not taken to bring about an honourable settle-

[27]S/PV 1245, p. 35.
[28]S/6710/Add. 1 and 2.
[29]S/6720, 28 September 1965.
[30]S/6683, paragraph 5.

ment of the Jammu and Kashmir dispute, we would be faced with the real danger of resumption of hostilities which may well lead to a conflict of much greater dimensions.[31]

Insistence upon a simple cease-fire, thus, was regarded by Pakistan as an invitation to a conflict of much greater dimensions. The threat was open and categorical. Bhutto, who made his first appearance in the Security Council debate on the India-Pakistan war of 1965, echoed similar views. It was imperative, he said, that a self-executing procedure be established for the settlement of the Kashmir dispute, and urged the Security Council to "invite immediate action for the implementation of paragraph 4 of the [20 September] resolution [to bring about] lasting peace to a war-torn subcontinent."[32] There had been a cease-fire before, he said, and there was a cease-fire then; but its effective, proper, and final implementation could come only when the Jammu and Kashmir dispute was honourably settled.[33]

The effect of the latest Security Council resolution and the attitude, expressed above, of the Government of Pakistan was perceptible on the front. The Secretary-General on 7 October indicated "in general an overall tendency toward improvement in the observance of the cease-fire."[34] In the next report, however, he indicated that the situation "has not improved and may have worsened during the period under review [7 October through 17 October], when there have been numerous confirmed breaches of the cease-fire of varying seriousness, a great many complaints about alleged violations of it have been submitted by each party, and tension is reported to remain high in most sectors . . . the existence of the cease-fire must be considered precarious."[35] Refraining from an "overall assessment of blame with regard to breaches of cease-fire,"[36] the Secretary-General, nevertheless, made a grave observation that "there is no reason to doubt the earnestness

[31]S/6715, 26 September 1965.
[32]S/PV 1245, p. 17.
[33]*Ibid.*
[34]S/6710/Add. 3, 7 October 1965, p. 7.
[35]S/6710/Add. 4, 18 October 1965, p. 1.
[36]*Ibid.*, p. 3.

of either party in desiring to honour this [cease-fire] agreement. But this attitude is not always reflected accurately at the front."[37] The friction arising out of a policy of edging-forward for tactical purposes, concluded the Secretary-General, "can be completely eliminated only when both sides agree to withdraw their armed personnel, as demanded by the Security Council, back to the positions held by them before 5 August 1965. Thus, while the cease-fire is the necessary first stage, subsequent withdrawals are essential to its continuing effectiveness."[38] Major-General MacDonald, Chief Officer of UNIPOM, had no success in effecting a disengagement of the armies. His proposal of "tactical readjustment" calculated to minimize the friction fell through.[39] He did achieve something, however, in his arrangement of limiting air activity on the CFL. The accomplishment of the military personnel were bound to be peripheral.

In tune with the precarious cease-fire on the India-Pakistan border was the position on the question of withdrawals. In his first report on this problem the Secretary-General listed positions occupied by the armed forces of each party on the other party's side. On the CFL in Kashmir Indian troops had occupied Pakistani positions in the Kargil-Skardu, Domell-Tangdhar, and Rawalakot-Uri-Punch sectors. Pakistani forces had occupied Indian positions in the Bhimber-Akhnur sector and its military-paramilitary forces were occupying some pockets of resistence, for example, in Galuthi. On the border also Indian armies had vantage positions.[40]

The Secretary-General, in his report on withdrawals, referred to Major-General MacDonald's conclusion "that from a purely military viewpoint the present cease-fire is hazardous in certain localities because incidents are virtually unavoidable when the positions held by troops of the opposing sides are as close as they are now, that is, sometimes only fifteen or twenty yards apart.[41]

[37] *Ibid.*, p. 1.

[38] *Ibid.*, p. 2, Add. 5 to 15 between 23 October 1965 through 7 January 1966 reiterate the worsening situation on the cease-fire line.

[39] S/6710/Add. 5, 23 October 1965.

[40] S/6719, 27 September 1965, p. 2.

[41] S/6719/Add. 1, 5 October 1965, p. 2.

Apart from the close proximity to which the Military Chief drew the attention of the Council the greatest single factor responsible to the near-breakdown of the cease-fire established by the Council and the deadlock over disengagement was the existence on the Indian side of the CFL of military-paramilitary elements constituting pockets of resistence. The Secretary-General had recognized categorically the existence of such elements in his report of 27 September. Obviously, they were the armed infiltrators and *mujahids* engaged in subversive activities at the rear. India took a firm line in insisting upon recalling these elements for a meaningful disengagement:

> Any schedule or plan of withdrawal of Indian troops has, therefore, necessarily to be related to and co-ordinated and synchronized with the withdrawal of Pakistan regular forces as well as armed men not in uniform who have crossed the cease-fire line and the international border between Jammu and Kashmir and West Pakistan, for all of whom Pakistan must undertake full responsibility.[42]

The Prime Minister of India also had stated emphatically in his letter of 14 September that "we shall not agree to any disposition which will leave the door open for further infiltrations or prevent us from dealing with the infiltrations that have taken place."[43]

That in simple was the crux of the problem. Pakistan was putting pressure on the Council to work out a plan of the settlement of the political problem underlying the conflict, i.e. Kashmir. That is to say, it was trying to submerge the simple case of aggression in wider and complex issues between the parties. India was insisting upon a condemnation of an act of aggression, established clearly by an organ of the UN (Secretary-General through UNMOGIP), or, at least, clearing out the remnants and sources of that aggression, before assuring disengagement from its own position of strength. The Indian case was simple indeed. But the Security Council failed to take due notice of this position.

[42]Letter dated 28 September 1965 from the Permanent Representative of India addressed to the Secretary-General, S/6720, p. 362.

[43]*Ibid.*

The items on the agenda on that day's meeting were the letter dated 22 October 1965 from the Permanent Representative of Pakistan addressed to the President of the Security Council,[44] (concerning Pakistan's conditions on withdrawal) and the reports of the Secretary-General, again, on withdrawals and on the observance of cease-fire.[45] The reports of the Secretary-General highlighted the precarious position of the cease-fire and the dimensions of difficulties involved in securing withdrawals.

The Pakistan Foreign Minister, Bhutto, who took the floor first, put forth emphatically the Pakistani case on withdrawals stating that the 20 September resolution stood as a whole; that "it was unrealistic, in political terms, to divorce the problem of the cessation of hostilities from that of settling the Jammu and Kashmir dispute"; that India was "flagrantly violating the cease-fire and then using the ineffectiveness of the cease-fire to frustrate any plan for withdrawal," and so on.[46] Then he went on to narrate stories of suppression. At that point the President of the Council pulled up the Pakistani delegate to confine himself to the question of withdrawals which alone was on the agenda. That sparked off an unprecedented scene in the Council. The delegates of Jordan, Ivory Coast, and France challenged the President's ruling, affirming that the question of withdrawals could not be considered in a vacuum.[47] Sardar Swaran Singh of India, addressing the Security Council, took exactly the opposite point of view.[48] And when the President relented saying that he was making only "an appeal of a constructive nature," not a ruling, and allowed Bhutto to continue, Sardar Swaran Singh withdrew from the Council.

Sardar Swaran Singh's withdrawal on both technical and substantial grounds (that the Security Council should not allow the Pakistani delegate to speak on matters irrelevant to the item on the agenda, and that the diatribe by Bhutto on so-called Indian "atrocities" was a "gross interference in the internal affairs of India") has great significance. It could be considered a watershed in the Indian attitude to the Kashmir problem and the handling of

[44]S/6821.
[45]S/6719/Add. 3, 22 October 1965; S/6710/Add. 5, 23 October 1965.
[46]S/PV 1247, pp. 21, 26, 37.
[47]*Ibid.*, pp. 41-2. [48]*Ibid.*, pp. 46-50.

the Kashmir problem by the Security Council. It was a clear notice to the Security Council that from that moment India would not allow itself to be pushed around.[49]

The support for India by the Soviet and Malaysian representatives did not prevent Bhutto from what at best was an unparliamentary outpour and, at worst, a scandalous vilification ca mpaign against India. Indulging in profanities ("absent war lords," "monstrous and habitual aggressor"), Bhutto reached heights of morbid fancy.[50] Thereupon there was nothing much that the Council could do. And typically the session ended with a forensic debate between the Soviet and the US delegates on the powers of the Secretary-General on strengthening the observation group on the cease-fire line. None referred to the speech of Bhutto.

The members of the Security Council tried fruitlessly to get the Indian delegation back to its deliberations. After some infructuous sessions on 27 October and 28 October the Council met again on 5 November 1964 to pass a new resolution. The resolution, regretting the delay in the full achievement of a complete and effective cease-fire and prompt withdrawal, reaffirming its resolution (211) of 20 September "in all its parts," requesting Indian and Pakistani cooperation, demanded

> the prompt and conditional execution of the proposal already agreed to in principle by the Governments of India and Pakistan, for a meeting of their representatives with a suitable representative of the Secretary-General appointed without delay after consultation with both parties, for the formulation of an agreed plan and schedule for the withdrawals of both parties; urges that such a meeting shall take place as soon as possible and that such a plan contain a time-limit of its implementation; and requests the Secretary-General to report on the progress in this respect within three weeks of the adoption of this resolutions.[51]

The resolution was adopted by nine votes to none. The Soviet Union and Jordan abstained. The latter did so because the resolu-

[49]*Ibid.*, p. 46.
[50]*Ibid.*, pp. 93-5, 109-10, 117.
[51]S/6876, 5 November 1965.

tion did not meet the Pakistani viewpoint fully. The Soviet contention was that the resolution passed over in silence its objection to the Secretary-General's unilateral decisions on the strengthening of the observers group on the cease-fire. The curtain dropped on the final act of the high-power drama staged in the Council with a mock battle between Goldberg (US) and Fodorenko (USSR) on the highly frivolous issue of private consultations in the lobbies and public stands in the Council.

The problem of disengagement could be solved outside of the United Nations (at Tashkent). The Secretary-General reported to the Security Council that the "implementation of this [Tashkent] declaration would, of course, also fulfil the withdrawal provisions of the Security Council resolutions."[52] And in his final report on the question the Secretary-General reported after the final withdrawals on 25 February: "The withdrawal provisions of the Council have thus been fulfilled by the two parties"![53]

[52]S/6719/Add. 5, 17 February 1966, p. 2.
[53]S/6719/Add. 6, 26 February 1966.

CHAPTER FIVE

SELF - DETERMINATION

"The Kashmir dispute has persisted for many years. The complexities that surround it are the complexities of politics and power. The issue involved is simple and clear: the right of a people to self-determination and the obligation of States to honour international commitments." So said Z.A. Bhutto of Pakistan in the Security Council on 7 February 1964.[1] It was not the first time or the last that such statements were made in the Council by the delegations of Pakistan, though the idea of self-determination by itself was a transformed version of the original notion of plebiscite. Other delegations had expressed similar feelings in the Council from time to time with varying terminology and temper.

Since the "complexities of politics and power" are beyond the scope of the present study only the basic constitutional issue of the right of people to self-determination will be examined in the present chapter. The other issue of India's international commitment will be taken up in the next chapter. Before we analyze the range and meaning of the concept of self-determination by reference to doctrine and State practice in historical perspective in the United Nations, the section might be commenced with two general comments on its applicability in the context of the Kashmir issue.

First, the question of self-determination for the people of Kashmir as claimed by Pakistan is a misnomer. The whole controversy between India and Pakistan is not whether the people of Kashmir are entitled to self-determination which, as will be seen in the following pages, is tantamount to independence, but whether the people should be given the right to ratify the Maharaja's accession or be allowed to opt out to join Pakistan—and if so under what conditions. That, in the usual connotation of the term, is not self-determination.

Second, the people of Kashmir for the first time in their sad

[1]*SCOR*, 1089th Meeting, 7 February 1964, p. 28.

history of subjugation and exploitation have started governing themselves. None can deny that the positions of authority in the State are occupied by Kashmiris. As for the charge so often made out by Pakistan that they are Indian stooges, one need only affirm that no nation, not even the nuclear colossi, have proved capable of sustaining stooges in positions of authority for long. People can acquire power through the barrel of gun but they cannot sit on the bayonet for long.

Self-determination is a concept which means different things to different peoples. Some have claimed that self-determination is a synonym of "self-government," others have used it to denote as a people's right to decide on their international status; still others have interpreted it to mean the right of colonial peoples to independence.

A significant section of the scholars and statesmen believe that it connotes the right of independent States to expropriate foreign industries. Some are baffled in the process of identifying a "separatist" movement from movements for self-determination. For the layman it means the right of minority groups to determine their own fate; and in the United Nations it has come more and more to be associated with the aspirations of dependent peoples. We would examine, firstly, the division on the scholarly and ideological level before we assess the State practice, as evidenced mainly in the UN, preceded by a resume of pre-UN State practice.

DOCTRINE

The juristic and doctrinal opinion in the West is divided about the concept of self-determination. To start with, the early writers on international law gave little attention to the subject. Moreover, the entire discussion in the initial stages was linked with the idea of plebiscites. So much so, as pointed out by Benjamin Rivilin[1a] even as late as some thirty years ago, an article on self-determination in the *Encyclopaedia of the Social Sciences* was concerned almost exclusively with the matter of plebiscite.[2]

[1a]Benjamin Rivilin, "Self-Determination and Colonial Areas," *International Conciliation, 1954-55*, No. 501, p. 196.

[2]Sarah Wambaugh, "Self-Determination," *Encyclopedia of the Social Sciences.*

Oppenheim says that it is "doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite." While admitting that "the necessities of international policy may now and then allow or even demand such a plebiscite," he contends that "in most cases they will not allow it."[3] Hall devotes a mere paragraph to the subject, where he commences with the statement that it is a misapprehension to regard the right of alienation as "subject to the tacit or express consent of the population inhabiting the territory intended to be alienated."[4] By way of reference to State practice in the nineteenth century, he adds:

> The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into International Law, and cannot be adopted into it until title by conquest had disappeared.[5]

Hershey also affirms that "it is certain that the legal validity of a title based on cession does not require such action [the holding of a plebiscite] on the part of the inhabitants of the ceded territory."[6]

Modern legal opinion on the place of the principle of self-determination in international law is divided. There are those who deny any legal validity to this doctrine, prominent among them being Hans Kelsen, Leland Goodrich, and Edward Hambro.[7] Others like Quincy Wright hold that it is a binding principle of international law.[8] A few regard it as a revolutionary principle,[9] unencumbered,

[3]L. Oppenheim and H. Lauterpacht, *International Law*, Vol. 1, London, 1948, Seventh Edition, p. 504.

[4]W.E. Hall, *A Treatise on International Law*, Oxford, 1895, Fourth Edition, p. 504.

[5]*Ibid.*, p. 49.

[6]A.S. Hershey, *Essentials of International Public Law*, New York, 1921, p. 184.

[7]Hans Kelsen, *The Law of the United Nations*, New York, 1950, pp. 51 and 53; Leland M. Goodrich and Edward Hambro, *The Charter of the United Nations —Commentary and Documents*, Boston, 1946, p. 61.

[8]Quincy Wright, "Recognition and Self-Determination," *Proceedings, ASIL*, 1954, pp. 23-37.

[9]"The principle of self-determination, directed towards independence, is, as the 'principio di nazionalita' in the 19th century, a revolutionary principle and the frequency with which it is invoked proves this to be basically revolutionary epoch." (Josef L. Kunz, "The Principle of Self-Determination of Peoples,

presumably, with legal norms and its validity depending upon its success. A discussion of the views of these modern authors can best be held in the context of the UN Charter.

The League Covenant, despite President Wilson's enthusiastic feelings about the principle of self-determination, did not mention the principle directly. One of the byproducts of World War II was the growing demand of the dependent peoples for emancipation from colonialism. Spearheaded by the Indian national leadership under M.K. Gandhi, Asian and African colonies pressed forward their demand for self-determination. Moved by the rising wave of nationalism the Allied Powers proclaimed their faith in this principle in what came to be known as the Atlantic Charter: "The right of all people to choose the form of Government under which they live." But in the face of Prime Minister Churchill's denial that this proclamation applied to colonies, the Dumbarton Oaks Proposals made no mention of it.

At the San Fransisco Conference, however, at the insistence of a number of small powers, many of whom had gained independence and for whom the Atlantic Charter represented the promise of a new world free of colonial domination, the principle of self-determination was incorporated in the UN Charter. To assuage British susceptibilities the principle was referred to in vague and imprecise terms in the context of the general purposes of the UN. As one of the purposes of the United Nations, self-determination finds a place as follows (paragraph 2 of Article 1): "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

The only other place where the principle of self-determination is mentioned is in the chapter on international economic and social cooperation (Chapter IX). Article 55 states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> a higher standards of living, full employment....

Particularly in the Practice of the United Nations," *Selbstbestimmungsrecht der Volker*, Vol. 1, Munchen, 1964, p. 132.)

In the following article all the members "pledge" themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

The phraseology of these articles has given rise to acute controversy over the validity of the so-called "principle of equal rights and self-determination of peoples." What does it mean to develop friendly relations among nations based on respect for this principle? Hans Kelsen, undoubtedly the greatest authority on the UN Charter, has severely criticized the provision. He argues:

> Self-determination of the people usually designates a principle of internal policy, the principle of democratic government. However, Article 1, paragraph 2, refers to the relations among States. Therefore the term "peoples," too—in connection with equal rights—means probably States, since only States have "equal rights" according to general international law.... If the term "peoples" in Article 1, paragraph 2, means the same as the term "nations" in the Preamble, then "Self-determination of Peoples" in Article 1, paragraph 2, can mean only "sovereignty" of States. The principle of "equal rights," that is the principle of equality of States, and the principle of self-determination, that is the principle of the sovereignty of States, are two different principles. But Article 1, paragraph 2, refers to "the principle," and not to the "principles," of equal rights and self-determination of peoples. This seems to indicate that the formula of Article 1, paragraph 2, has the same meaning as the formula of Article 2, paragraph 1, in which the principles of sovereignty and equality are combined in the rather problematic way into one principle: that of "sovereign equality."

Kelsen believes that the UN is concerned only with the maintenance or preservation of independence, and that the Charter references to the principle of self-determination have no special meaning other than the rights of States to sovereignty. Further, in his views, as far as the Charter is concerned, the idea that self-determination necessarily implies an inherent relationship to a democratic form of government is untenable:

That the purpose of the Organization is to develop friendly relations among States based on respect for the principle of self-determination of "peoples" does not mean that friendly relations among States depend on democratic form of government and that the Purpose of the Organization is to favour such form of government. This would not be compatible with the principle of "sovereign equality" of the Members, nor with the principle of non-intervention in domestic affairs established in Article 2, paragraph 7.[10]

There is a strong section of scholars which holds, however, an exactly opposite view. Quincy Wright, for example, emphasizing the obligations of member-States says thus:

Apart from the general purpose of the United Nations, stated in Article 1 (para 2) and 55, "to develop friendly relations among nations based on respect for the principle of equal right and self-determination of peoples," by Article 56 "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. . . ."

The term "pledge" indicates that an international obligation has been accepted. Consequently, the Members cannot give a final interpretation of the meaning of this article. That interpretation is not a matter of domestic jurisdiction, even though, with the presumption referred to, the article might be held by an international tribunal to have a somewhat limited content. Whatever the pledge is, it clearly applies to all people within the State's control, whether they live in colonies or protectorates separated by salt water or in its own home territory.[11]

Quite a few writers in recent times have strongly supported Professor Wright's viewpoint. Prominent among them is the Latin-American jurist and a judge of International Court of Justice, Alejandro Alvarez, who believes that self-determination has gained

[10]Hans Kelsen, *The Law of the United Nations*, New York, 1950, pp. 51-3.

[11]Quincy Wright, "Recognition and Self-Determination," *Proceedings, ASIL*, 1954, p. 30.

a place in the new international law propounded and propagated in his famous treatise, *Le Droit International Nouveau.*[12] Another Latin-American jurist (Brazilian), Sinval Palmeira, holds that self-determination "is the legal formula of a peoples' political and economic independence. It means that every nation, State, or people has the right to determine its political system, solve its domestic economic problems as it wishes, and freely trade with other States, nations, and peoples without any international control."[13] The Soviet jurists and statesmen also arrive at the same thesis, but through a different route.

Marxism-Leninism has a "proletarian-revolutionary" presentation of the question of national self-determination.[13a] This theory disclaims that the right of self-determination is merely "an ethico-aesthetic fiction without a historic foundation," and proclaims that *all* peoples and nations, without exception, have a right to national self-determination; that it is not a right to autonomy or cultural-autonomy, but a right to *State secession;* that this right to secede is dependent upon the expediency to secede and is subordinate to the struggle for the *class aims of the working class*, the struggle for socialism.[14] Lenin proclaims that the right of self-determination "cannot be interpreted as anything but political self-determination, that is the right to secede and form an independent State."[15] Again, it "implies only a consistent expression of struggle against all national oppression."[16]

What is thus proclaimed on one hand is taken away by the other on the basis of the logic that the economic progress and the interests of the masses will best be served not by the artificial creation of many small States but by forming big States. Disunite to unite is thus the slogan of Marxism-Leninism.[17] The idea is that it is really

[12]A. Alvarez, *Le Droit International Nouveau*, Paris, 1960, pp. 8, 113.

[13]Sinval Palmeira, "The Principle of Self-Determination in International Law," *Review, International Association of Democratic Lawyers*, No. 1 (3), 1954.

[13a]See G. Starushenko, *The Principle of National Self-Determination in Soviet Foreign Policy*, Moscow (undated), *passim.*

[14]*Ibid.*, pp. 43, 51.

[15]V.I. Lenin, *Collected Works*, Vol. 19, Fourth Russian Edition, Moscow, p. 213.

[16]V.I. Lenin, *Questions of National Policy and Proletarian Internationalism*, Moscow, pp. 138-9.

[17]V.I. Lenin, *Collected Works*, Vol. 20, Fourth Russian Edition, p. 92.

impossible to form a democratic multinational, and economically viable, State without the peoples and nations constituting it enjoying the right to self-determination. The novelty of the Marxist-Leninist approach to the principle of national self-determination is that they do not regard this principle as an end in itself. It is, for one thing, a means of implementing another very important principle—the principle of proletarian internationalism—and serves as a tool in the establishment of conditions of peaceful coexistence in the world. In short, "the ultimate aim pursued by Marxists in advancing the principle of self-determination in the *rapprochement* between nations, promotion of the closest possible political, economic and cultural ties among them in the present and their gradual fusion in the remote future."[18]

The Marxist-Leninists hold that the principle of self-determination began to take roots in international law after the Great October Revolution;[19] and that with the adoption of the UN Charter the political principle of national self-determination had acquired the character of an international law principle.[20] The content of the principle, according to them, consists in "*the right of every people and every nation to decide all questions concerning its relations with other peoples and nations up to and including secession and formation of independent states, as well as all questions concerning the internal system without interference from other states.*"[21]

The "people," however, for Marxist-Leninists are the "proletariat, the peasantry and the petty national bourgeoisie," and Lenin advocates different mixture of these classes in different social, economic, and political set-up, for the "determination" of the "self."[22] The whole doctrine of national self-determination is then projected into the context of national liberation movements in colonial areas.[23] Summing up the Marxist-Leninist doctrine on the subject the Marxist writer Starushenko says:

> The decisive factor in the solution of the question of self-determination is the will of the self-determining people, and not

[18]G. Starushenko, *op. cit.*, p. 67.
[19]*Ibid.*, p. 170.
[20]*Ibid.*, p. 167.
[21]*Ibid.*, p. 169.
[22]*Ibid.*, pp. 68-9.
[23]For fuller discussion of this aspect see George Ginsburg, " 'War of National

the interests of the administering power or other states. Since the colonial powers break their international pledges and do everything to prevent the oppressed peoples from availing themselves of the right to self-determination, the latter are entitled to resort to any means, including national liberation war, to realize this right.[24]

A sophisticated variation of this approach was recently presented by Milena Srnska of the University of Prague, Czechoslovakia.[25] Without any reference to the Marxist-Leninist doctrine, the author arrived at the same conclusion that the principle of self-determination was a universal, generally binding norm of international law. Referring to the General Assembly resolution 1514 (XV) adopted on 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples), the author states:

> As 89 delegations voted in favour of this resolution and no state voted against and there were only nine abstentions, the content of this resolution may be considered as *communis opinio*, as evidence of the practice followed in this respect by almost all countries.
>
> Although one cannot consider the Declaration as a source of international law in the classical sense of the term—since this is true only of international treaty and custom—there can be no doubt that the practical action of all states (and the Declaration, in fact, is an expression of the practice of all states) does create law, if not *ipso jure*, certainly *ipso facto* and that with respect to the obligations and norms arising therefrom, at a level that is not too far removed from that of international custom.[26]

A similar opinion was voiced by a much-acclaimed Western author,

Liberation' and the Modern Law of Nations—the Soviet Thesis," *Law and Contemporary Problems*, Vol. 29, Autumn 1964, pp. 910-42.

[24]Starushenko, *op. cit.*, p. 233.

[25]Milena Srnska, "On the Principle of Equal Rights and Self-Determination of Nations," *The Legal Principles Governing Friendly Relations and Co-operation among States* (Seminar organized by the World Federation of United Nations Associations in April 1965 at Smolenice in Czechoslovakia), Leyden, 1966, pp. 115-29.

[26]*Ibid.*, p. 120.

Rosalyn Higgins. On the basis of the number of resolutions passed in this connexion in the UN she concluded that these

> clearly indicate that the great majority of states in the United Nations believe that a legal right of self-determination exists and that neither Article 2 (7), nor indeed domestic constitutional issues in general, can impede the implementation of that right and United Nations jurisdiction for that purpose.... It therefore seems inescapable that self-determination has developed into an international right....[27]

The above opinions raise a number of issues. Are the UN resolutions on the principle of self-determination sufficient evidence of State practice? Do they represent a *communis opinio;* if so, is it sufficient to establish "law, if not *ipso jure*, certainly *ipso facto*"? In other words, has self-determination referred to in the Charter as a "principle" been transformed into an international "right" in the course of practice in the UN? The following section is devoted to an examination of these issues. But before that we would examine the views of another school of thought.

There is another school of thought, represented by Clyde Eagleton, who, referring to the UN practice in this regard and the claims made by member-States invoking the principle of self-determination, held that "a noble word" was being abused, that it was "being torn to pieces."[28] Professor Eagleton's argument is that the principle of self-determination "is a two-edged concept which can disintegrate as well as unify"; that the "United Nations has no authority in the matter, in a legal or constitutional sense; it is not authorized to issue a ukase freeing a people from a State and setting up a group as independent; it cannot establish rule or criteria for self-determination which are legally binding on anyone."[29] Citing examples where self-determination was superimposed without caring

[27]Rosalyn Higgins, *The Development of of International Law through the Political Organs of the United Nations*, London, 1963, p. 103.

[28]Clyde Eagleton, "Excesses of Self-Determination," *Foreign Affairs*, Vol. 31, 1953, pp. 592-604; Clyde Eagleton, "Self-Determination in the United Nations," *AJIL*, Vol. 47, 1953, p. 88.

[29]*Foreign Affairs*, 1953, pp. 593-4.

for "cohesiveness or capability to stand alone," and referring to the resolutions passed by the UN in this regard, Eagleton concludes:

> Self-determination is a noble ideal, and worth working for; it has failed in the past because of the lack of an international law or organization able to apply it. With the United Nations, it becomes possible to work out criteria and methods ... based upon justice and upon common sense, and little respect has been shown to either in the current debates. It is not merely the people concerned, but the community of nations, which has an interest; reckless application of the principle could easily lead to great dangers for the community of nations.[30]

The following section of this chapter would be devoted to an appraisal as to whether the claims made by States in the name of self-determination were "abuses" of "a noble word." But here it would suffice to verify whether the UN "has no authority in the matter, in a legal or constitutional sense," and whether it can dictate a solution on the basis of this principle.

The proponents of the view that members of the UN have committed themselves to the path of friendly relations based upon the principles of equal rights and self-determination are motivated by the noblest of ideals of promoting democratic systems of government and emancipation of peoples under colonial yoke. But they err when they try to accommodate the UN efforts in this regard within the meaning of Article 1, paragraph 2, and Articles 55 and 56. The UN efforts toward the emancipation of colonial people and towards promoting democratic practices, as will be seen in the next section, were largely promoted under Chapters IX to XIII, i.e. within the framework of its competence over the dependent peoples in trusteeship territories and non-self-governing areas. The criticism, again of the "noble" principle being distorted in the UN, etc., is mainly aimed at the extravagant claims made by champions of self-determination on behalf of these colonial dependencies.

Support for the principle of self-determination as being obligatory on member-States cannot be found in Article 1, paragraph 2, or in Article 55, where alone this principle is mentioned as such. It is

[30] *AJIL*, Vol. 47, 1953, p. 93.

evident from Chapter I of the UN Charter entitled "Purposes and Principles" that Article 1 under this chapter enumerates the "Purposes" and Article 2, the "Principles." If the principle of self-determination was considered as being of a binding character either on the Organization or on the members it would have found its place in Article 2. The purposes of Article 1 are in the nature of aims or goals set before the UN by the framers of the Charter. The Organization and the members proclaim in this article the goals which they like to achieve. A goal must be distinguished from a principle. A principle relates to the means. That is the spirit in which it is used in paragraph 2 of Article 1.

The UN under this provision proposes to "develop friendly relations among nations *based on respect for the principle* of equal rights and self-determination of peoples" (italics ours). The natural and ordinary meaning of the italicized phrase is that the UN is enjoined to develop friendly relations among nations not at the cost of equal rights of peoples and the principle of self-determination, which is the same thing, as rightly pointed out by Kelsen. To put it in a different way, the framers of the Charter believed that promotion of friendly relations among nations must be striven to be based on respect for the so-called principle of self-determination of peoples.

In general terms, if relations between two member-States are strained owing to a dispute over a segment of one's territory or the denial of self-determination to a group of people in that country, the UN can strive to promote friendly relations based on respect for the genuine aspirations of that part or group of people. The UN draws its competence from this general provision. The detailed procedural and functional competence in this regard is linked with the dispute-settling function of the UN under Chapter VI. The functional competence of the UN under this chapter, as is well established, does not give rise to binding obligations *per se*. If a member refuses to accept UN intervention in this regard there is no remedy under the Charter, except when the situation is such as to constitute a threat to the peace or breach of peace or act of aggression.

This brings us straight into the inherent contradiction in the Charter. While the UN, under Article 1, paragraph 2, is authorized

to strive to achieve friendly relations among nations based on respect for the principle of self-determination of peoples, Article 2, paragraph 7, prohibits the UN from intervening in matters which are essentially within the domestic jurisdiction of any State. How can the UN promote friendly relations among nations based on respect for self-determination of a group of people in a member's territory and yet not violate the domestic jurisdiction clause of Article 2, paragraph 7?

The question of the political status of a group of people in a member-States' territory is a matter, by any standards, essentially within the domestic jurisdiction of that member-State. The first few words in Article 2, paragraph 7, viz. "nothing contained in the present Charter shall authorize," must debar UN competence emanating from Article 1, paragraph 2. But, the prohibition of the domestic jurisdiction clause becomes effective only to UN "intervention." It is now a well-established practice in the UN that discussion and recommendations of a general nature do not constitute "intervention" within the meaning of Article 2, paragraph 7.[31]

It is clear, therefore, that the competence of the UN arising out of Article 1, paragraph 2, will not be affected by the domestic jurisdiction clause of Article 2, paragraph 7, as long as the UN activity in this regard is restricted to debate and hortatory resolutions. In other words, the UN cannot dictate solutions based on respect for the principle of self-determination unless, as in the case of Rhodesia, it brands the defiance of a determined minority government as constituting a threat to the peace.

As for the question whether member-nations are obliged to ensure self-determination for peoples within their territories, a careful examination of Articles 55 and 56, traditionally invoked by the proponents of this theory, would reveal that it is not so. It is well known that there was a firm belief at the San Fransisco Conference that world peace and international security were as much dependent upon the creation of positive conditions of stability and well-being of nations as upon the negative aspect of dispute-settlement and enforcement machinery. The Charter thus devotes full five chapters

[31]M.S. Rajan, *United Nations and Domestic Jurisdiction*, Bombay, 1958, pp. 352 ff.; Quincy Wright, "Is Discussion Intervention,"*AJIL*, Vol. 50, 1956, p. 102.

(IX to XIII) on means to secure the positive conditions for world peace. Chapter IX deals with the promotion of international economic and social cooperation. The following chapter creates the machinery for this purpose, viz. the Economic and Social Council. Chapters XI and XII aim at promoting the well-being of dependent peoples, followed, again, by a chapter (XIII) creating a machinery (the Trusteeship Council) for the purpose.

It is in this schematic set-up that Article 55 finds its place. The article states:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> *a.* higher standards of living, full employment, and conditions of economic and social progress and development;
>
> *b.* solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> *c.* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The next article (56), which is crucial for the understanding of the nature of obligations undertaken in this chapter, reads: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

As Article 56 makes it clear, Article 55 contains certain social and economic "purposes" for the promotion of which the members "pledge" to take joint and separate action. The purposes are neatly enumerated from (*a*) to (*c*) in Article 55. But for the general reference to "human rights and fundamental freedoms" in paragraph (*c*) there is no mention of self-determination in the enumerated purposes of Article 55. The principle of self-determination finds a place in a sort of preambular paragraph preceding the purposes in this article. This paragraph is preambular in nature because

it explains, in part, as to why the following purposes are sought to be achieved, viz. "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations." The phrase which follows next, i.e. "based on respect for the principle of equal rights and self-determination of peoples," is a mechanical repetition of the formula adopted in Article 1, paragraph 2, the range and meaning of which has been ascertained in the previous pages.

The "pledge" that all members make in Article 56 to take joint and separate action relates to the purposes set out in paragraphs (*a*) to (*c*) in Article 55, and not to the principles of self-determination adverted to mechanically in passing references in the preambular paragraph. That is to say the members of the UN are not legally obliged under the Charter to apply the principle of self-determination to the *constituent parts of their territories.* The whole history of Human Rights Conventions and the UN efforts in the field of decolonization bears out this thesis. An appraisal of the UN efforts in this regard will be made after the following brief historical resume of State-practice before the formation of the UN.

STATE PRACTICE

The earliest expression of the principle in State practice can be found in the American Declaration of Independence, which claimed: "When in the course of human events it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assure among the powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them." The reverberations of this faith echoed a few years later in the French Revolution. The Declaration of the Rights of Man and of the Citizen proclaimed that "men are born and remain free and equal in rights.... The aim of all political associations is the preservation of the natural and imprescriptible rights of man."

In consonance with the spirit of the above declarations a number of references to the people of disputed territories were made in the following years. Prominent among such plebiscites were those

held in the two Papal districts, Nice and Savoy, to ascertain whether the people of these regions wished to be united with France.[32]

The idea of reference to popular opinion about the status of a particular region caught on so well that statesmen saw in this process seeds of disintegration of empires. During the year 1791 and the subsequent years a number of territories were annexed by France after plebiscites, but in each case troops of the occupying powers were present so that the popular reference could be called hardly free.

Napoleon III, who was an ardent advocate during the Revolution of the free and equal rights of man,had consented in deference to the feelings of the European nations "to the free consent of the people" of Nice and Savoy under the treaties with Sardina. But he sent troops to occupy the territories and to carry on propaganda in support of the cession to France. He refused likewise to extend the right of self-determination to the peoples of Haiti. When the Haitians resorted to arms and set up their own government, Napoleon sent out his brother-in-law with 25,000 troops, in a futile attempt to quell the revolt.

The doctrine of self-determination did not receive enthusiastic support from the British and US statesmen either. Though Gladstone at the close of the Franco-Prussian War had violently protested against the annexation of Alsace and Lorraine by Germany, he opposed the suggestion of holding a plebiscite in connection with the cession of Heligoland to Germany in 1890. Similarly in 1867 when Denmark wanted a plebiscite to be held in the islands of St. Thomas and St. John in the West Indies before ceding to the US, the Secretary of State, W.H. Seward, notwithstanding the fact that the plebiscite actually turned out to be in favour of the US, said:

> The United States were unwilling to make the treaty conditional upon the consent of the people of the islands ceded.... The popular vote which is to be taken in the islands is asked by the Danish Government for its own satisfaction, and not for that of the

[32]For an illuminating discussion on plebiscites before 1927, see F. Llewellyn Jones, "Plebiscite," *Transactions, Grotius Society*, Vol. 13, London, 1928, pp. 165-86.

United States.... They are willing to accept the cession if notified by the Senate and confirmed by the Rigsdag of Denmark.[33]

The Wilsonian enthusiasm for the principle of self-determination manifested itself in the peace treaties signed after World War I. The peace settlements envisioned a number of plebiscites, some of which materialized and some petered out. The significant plebiscites of the former were Schelswig in 1920, as required under Part III of the Treaty of Versailles; the plebiscite of Allenstein and Marienwerder in 1920, also under the Treaty of Versailles; the plebiscite of Klagenfurt Basin and Upper Silesia in 1921; and another in Sopron in the same year. The characteristics of these plebiscites were that they were held immediately after the decision was made, and they were of inconsequential nature.

The plebiscites which were of graver significance, however, were marked by procrastination leading ultimately to abandonment. Under a decision of the Council of the League of Nations, for instance, a plebiscite was to be held in Teschen, Spisz, and Oraba in 1920. But, as tension in the area mounted and racial hatred flared up, the plebiscite was abandoned.[34]

A similar fate befell the proposal to hold a plebiscite in Vilna. The main cause in this case was procrastination. It became clear from the debates in the League Council that "the inevitable consequences of these delays in carrying out the plebiscites is to make it impossible for the Council to adhere to its plan of speedy Popular Consultation as originally contemplated." The Council "has therefore been compelled to consider whether the parties interested really and sincerely desire a Popular Consultation and if it would not be possible to devise some more simple and effective procedure."[35] And the French effectively blocked a plebiscite in the famous Alsace-Lorraine on the ground that it "would be to sanction the wrong done in 1871 by admitting the lawfulness of that act of violence."[36]

[33] *Ibid.*, p. 167.

[34] See Sarah Wambaugh, *Plebiscites since the World War*, Vol. 1, Washington D.C., 1933, p. 156.

[35] League of Nations, Minutes of the Twelfth Session of the Council, Annex 163*b*, p. 101.

[36] Sarah Wambaugh, *op. cit.*, p. 17.

The plebiscite in Kashmir, admittedly, could not be held without rousing religious passions. Sir Feroze Khan Noon went to the length of justifying appeals to religious sentiments in plebiscites. An encounter in 1957 between Sir Feroze Khan and V.K. Krishna Menon on this point in the Security Council might be recorded usefully:

> *Noon:* It would be perfectly legitimate in the case of a plebiscite to draw attention to religious, cultural, linguistic, economic, geographic, strategic and other ties, affinities and considerations that might sway the choice.... Whereas in an election it is the duty of a Government to see that it is free and no religious arguments are brought in, in the matter of a plebiscite, wherever it is held, it is held because of religious differences or linguistic or other ethnic differences or of geographic, linguistic or other differences. Therefore in a plebiscite it is quite legitimate for peoples to appeal to the electorate for these reasons before they decide whether to accede to one side or the other.[36a]
>
> *Menon:* Then there is a reference ... which is very vital to us in regard to what we consider as essential in any kind of election or plebiscite—that is freedom from religious propaganda. That is to say, no one shall be subjected to the threat or to the fear that he will suffer disabilities in another world if he votes in this way, that way or the other way. This is not only against the character of a secular State, but against the whole conception of the United Nations.[36b]

The essence of the plebiscites held and avoided in the post-World War I peace settlements was that plebiscites were not open-ended affairs, and that tensions, racial or religious, were anything but a conducive atmosphere to hold plebiscites. The Alsace-Lorraine episode confirms that plebiscites can never lend legal imprimatur to situations brought about by force. It is well to cite in this context Johannes Mattern, an eminent authority on the subject:

> Plebiscites can render effective service only when and where such binding agreements, *free from all force*, have been reached

[36a]*SCOR*, 770th meeting, 18 February 1957, p. 9.
[36b]*SCOR*, 772nd meeting, 20 February 1957, p. 7.

> in advance by the parties involved to the effect that a majority of a fixed and agreed proportion shall prevail, and where the plebiscite is employed solely to establish which side of the issue involved can muster this majority and where the resulting minority is assured of a fair degree of local autonomy and the enjoyment of its own language and religion.
>
> No state can, at the present time from the point of view of constitutional law, recognize the right of secession founded upon the principle of self-determination. By doing so it would invite its own destruction.[37]

It might be pointed out here that the Indian commitment, if any, on plebiscite was made in circumstances characterized by force, was obtained in the Council by politically motivated manouevring, and was dependent upon the prior condition that Pakistan withdraws its regular and irregular armed forces. From beginning to end, that is to say, it was characterized by force and was conditioned on the rectification of the same. Such a "promise" of plebiscite in Kashmir, tainted by force from the beginning, could hardly have survived for two decades.

Another factor which must be noted is that the principle of self-determination was applied in the territorial settlements of Eastern Europe and the Balkans, for the break-up of the empires which had impinged on that part of the world.[38] But Wilson could not succeed in getting the principle incorporated in the Covenant of the League of Nations. Instead, a "gentle and evolutionary"[39] formula was adopted, viz. "the well-being and development of such peoples [under the Mandate System] form a sacred trust of civilization." Though, as Emerson points out, the rhetoric of self-determination continued on into the twenties and the thirties, the right for all practical purposes had exhausted itself in its applica-

[37]Johannes Mattern, *The Employment of the Plebiscite in the Determination of Sovereignty*, Baltimore, 1920, pp. 202-3. (Italics ours.)

[38]Rupert Emerson, "Self-Determination Revisited in the Era of Decolonization," *Occasional Papers in International Affairs*, No. 8, December 1964, Harvard University Center for International Affairs, Cambridge Mass., 1964; Rupert Emerson, *Proceedings*, *ASIL*, 1966, pp. 135-41.

[39]Benjamin Rivlin, *op. cit.*, p. 197.

tion to the specified time, place, and people.[40] Essentially, the principle of self-determination in the post-World War I territorial settlements was used as a tool to destroy the European land empires. And in the post-World War II period it has been successfully used for the purpose of ending overseas colonialism.

SELF-DETERMINATION IN THE UNITED NATIONS

The principle of self-determination, like virtue, receives in theory the full-throated support of every member-State of the United Nations. But when it comes to the question of implementation in actual practice the members have shown an ambivalent attitude. Some of these attitudes have been reasonable, some unreasonable. The newly independent States, while vociferously championing the cause of self-determination as applied to colonial territories, have denied its applicability to sectional and tribal ambitions in their own territories. This, they argue, would open up the Pandora's box and lead to chaos and disintegration.

The colonial powers, championing on the one hand the right of some group of people in Asian-Arab-African States to self-determination, challenge its applicability to their overseas possessions on the other. The alleged grounds for this attitude are that the colonial territories are only "overseas provinces," which, they claim, are within the domestic jurisdiction of these powers. The UN, it is argued, is prohibited to intervene in the affairs of the colonies just because they are separated by salt-water.

The Communist bloc countries deny the applicability of the principle of self-determination to the East European countries dominated by the Soviet Union.[41] Yet they are the stoutest champions of the cause of dependent peoples for immediate independence. The Belgians have a celebrated thesis which recognizes the right of self-determination of all groups of people, but they had great difficulty in adjusting themselves to the independence of the Congo. To ascertain the veracity of the principle one need only look into the efforts of the UN to lay down criteria for self-determination of peoples.

[40]Emerson, *Proceedings*, *ASIL*, 1966, n. 38, p. 137.
[41]See Quincy Wright, "Subversive Intervention," *AJIL*, Vol. 54, 1961, p. 521.

It was shown earlier that self-determination was neither a generally recognized principle in traditional international law, nor had a firm footing in the UN Charter. It was used in the Charter in a loose and imprecise manner. That was because the framers of the Charter themselves were not sure as to its relevance in the constituent instrument of an organization primarily meant to ensure world peace and security. Moreover, there was strong opposition to its incorporation in the Charter from the colonial powers, despite the initial acceptance of this principle in the Atlantic Charter. A rhetorical and passing reference to the principle was found to be a temporary solution. The records of the UN conference at San Francisco reveal this partly ambivalent and partly push-it-under-the-carpet attitude.

The relevant passages in the San Francisco documents read as under:

> The principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct... the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace... an essential element of the principle in question is a free and genuine expression of the will of people....[42]
>
> Concerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and *not the right of secession.*[43]

The divergence of opinion grew with the Organization. There were several clashes of these two schools of thought on various fronts. One such front was the Human Rights Conventions. In 1950, the Commission on Human Rights, which had prepared a Draft Convention on Civil and Political Rights, had included in it

[42] "United Nations Conference on International Organization," *Documents*, Vol. 6, New York, 1945, p. 396.

[43] *Ibid.*, p. 296. (Italics ours.)

a provision which permitted the colonial powers to decide whether or not the Convention should apply in any particular instance. In the debate that ensued in the General Assembly the anti-colonial powers attacked this clause vehemently as being a device to enable the colonial powers to perpetuate their stranglehold on the dependent peoples and deny them basic human rights. The draft was re-submitted to the Commission with instructions to drop the "colonial clause" and to include a provision to the effect that the Covenant should extend to or be applicable equally to signatory metropolitan States and to all territories, whether non-self-governing, trust, or colonial territories, which were administered governed by such metropolitan States.[44]

Thus was initiated the battle for gaining recognition for the principle of self-determination through the Human Rights Conventions. In 1952, the Arab-Asian States, with the strong support of the Soviet Union, prevailed upon the Assembly to pass a resolution wherein it was specifically urged upon the Human Rights Commission to include the statement that "all peoples shall have the right of self-determination."[45]

Acting on these instructions the Commission adopted the following provisions for inclusion in the draft conventions:

> 1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social, and cultural status.
>
> 2. All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.

Another significant paragraph was added to the draft in tune with the anxiety of the Latin-American States to uphold economic independence along with political independence. This read:

[44] *GAOR*, Fifth Sessions, Third Committee, 294th meeting, 26 October 1950.
[45] General Assembly Resolution 545 (VI), 5 February 1952.

> 3. The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.[46]

For the proponents of the provisions on self-determination in the Human Rights Conventions the step was a logical fulfilment of the objectives of the UN Charter, for, according to them, it was a prerequisite to the enjoyment of all other human rights and therefore must be included in the conventions on human rights.

As against this proposal the Western colonial powers advanced a number of arguments. Self-determination, according to these powers, was a collective right and as such had no place in conventions devoted to the rights of individuals; that the concept was not susceptible to legal formulation, etc. But the main difficulties were posed by these powers at the time of discussing the question of implementation of the conventions. Here again the colonial powers sought to exclude the provision on self-determination on the grounds that the proposed Committee on Human Rights would be assuming the role of an arbiter of "collective rights involving grave international political problems."

The majority of the members, however, felt that exclusion of this provision alone from the competence of the proposed committee would be unwise. A special procedure was adopted for the implementation of the article on self-determination. Under this procedure States, parties to the conventions, including those responsible for the administration of Non-Self-Governing territories, would undertake to report annually to the Human Rights Committee on the measures taken by them to meet obligations set forth in the article on self-determination.

Nevertheless, the resolutions in the UN transforming, as pointed out recently by Rupert Emerson, into a *right* of the *principle* of self-determination have been growing so fast that if these resolutions were to be laid end to end they would no doubt, with symbolic

[46]*Economic and Social Council, Official Records*, Sixteenth Session, 1953, Supplement No. 8, Annex I, p. 39.

justice, encircle the impressive array of the flags of 123 members, which flutter in front of the UN Headquarters in New York.[47]

The outstanding example of the above resolutions was the one passed in 1960 entitled "Declaration on Granting Independence to Colonial Countries," unanimously adopted by the General Assembly—the United States and other Western powers abstaining.

Opening with a preamble which proclaimed the necessity of bringing colonialism in all its forms and manifestations to speedy and unconditional end, this Declaration reads as follows:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

[47]Emerson, *Proceedings, ASIL*, 1966, n. 33, p. 136.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

As can be seen the Declaration embodies the aims, aspirations, as well as the apprehensions of the framers of what Rupert Emerson has called "the new higher law" on self-determination.[48] While, on the one hand, it condemns colonialism, urges its immediate end, brooks no delay on any pretext whatsoever, and forbids repressive measures to crush popular revolts in dependent territories, it upholds also, on the other hand, in paragraph 6, the national unity and the territorial integrity of a country. It enjoins States, under paragraph 7, to observe "faithfully and strictly" the principles of equality and non-interference in the internal affairs of all States. Respect for the "sovereign rights of all peoples" is coupled in the last clause of paragraph 7 with "their territorial integrity."

Emerson has explained this dichotomy of approaches in the Declaration as follows:

> If its primary purpose is the right to overthrow alien rule, its secondary and almost equally important purpose is very close to bring reverse of this. Self-determination has been proclaimed as the inalienable right of all dependent peoples and has in fact been applied to the great bulk of them; but in the eyes of most of those who have been asserting the immediate and unchallengable validity of self-determination, it has, once exercised, no justification for a reappearance on the scene. It represents, in other words, no continuing process but has only the function of bringing independence to people under alien colonial rule.
>
> As colonialism is held to be incompatible with the Charter, so is any attempt to appeal to self-determination in such fashion as to disrupt "the national unity and the territorial integrity" of a country which is achieving or has already achieved independence.

[48]Rupert Emerson, *Occasional Papers*, n. 38, p. 1 and *passim*.

Viewed in this light the sweeping generalization of paragraph 2, viz. "all people have the right to self-determination," can only mean "all peoples under alien subjection" have the right of self-determination. This interpretation is borne out in practice in and outside the United Nations. Of the endless number of cases where the principle of self-determination was invoked, the most striking are the cases of Sudan and the Somalia-Ethiopian dispute.

Sudan represents a classic case of artificial boundaries inherited from colonial masters without in reality conforming to the ethnic, religious, and racial frontiers. The northern part of Sudan was predominantly Arab. The southern provinces, under the influence of Christian missionaries, had English as their administrative language while the northern part was administered in Arabic. Owing to the peculiar geographical hindrances, communication between the two parts was minimal and the south came to be nelglected, as a result of which the southern Sudanese developed political ambition of a secessionist character. At the time of independence (1956) and threafter there was growing political agitation for an independent status. There were several appeals by southern Sudanese political parties for the right of self-determination. The Khartoum government successfully stifled such claims. The other African and world leaders looked askance at such endeavours.

The Somalia-Ethiopia dispute serves as a good example where the so-called principle of self-determination and the hard realities of national unity and territorial integrity find themselves in friction. By historical reasons and colonial policies the Somalis have lived scattered across arid frontiers of Ethiopia, Kenya, and French Somaliland. When the Somalis attained independence in 1960 from the Italian-administered trusteeship their aspiration for a Greater Somalia was rekindled. Every effort was made by Somalia authorities to claim independence for those parts of Ethiopia and Kenya which were predominantly inhabited by nomads of Somali stock. Every time it was turned down. The Somali delegate got a cold reception when he tried to raise the issue in the debates in 1960 General Assembly on the famous Declaration concerning colonial independence.[49]

[49]General Assembly Resolution 1514 (XV), 13 December 1960.

The General Assembly resolutions on self-determination, thus, were conceived, drafted, and adopted in the context of decolonization. They were aimed at the colonial powers, and apply to dependent peoples in the Trusteeship, Non-Self-Governing and other colonial territories. Any attempt to extend their application, despite the loose, broad terminology ("all peoples") employed therein, to establish States with demarcated boundaries will create havoc in international relations. That was the rationale of the resolutions adopted at the OAU Summit Conference and the Non-Aligned Conference in 1964 reaffirming the validity of all frontiers as they existed at the date of independence, whatever might be the differences of opinion amongst scholars.[50] The above resolutions represent the entire Afro-Asian-Arab State practice.

One need only cite a few examples to expose the absurdity of the argument in favour of the application of the principle of self-determination to "all peoples" literally. That would give a legal imprimatur to the political ambitions of a section of Mormons, the Formosans, the Welsh, the Kurds, etc. In Pakistan itself the Baluchis, the Pakhtoons, and the East Bengalis could justifiably press their demand.

Precisely for this reason the application of the principle of self-determination has been expounded and limited in the United Nations, and "all peoples" have been identified as the non-self-governing peoples separated by salt-water from their colonial masters who are all white European or European-descended peoples. Outside this sphere, the conclusion of Emerson is absolutely justified, i.e. "that all people do *not* have the right of self-determination; they have never had it, and they will never have it."[51]

[50]At the Annual Conference of the American Society of International Law, Washington D.C., in 1966, Professor Bowett of Cambridge University challenged the affirmation of the Afro-Asian powers that the principle of self-determination operates within the context of decolonization. Professor Emerson of Harvard, on the other hand, claimed that the "African insistence on maintenance of existing states is not a selfish whim but a profound political necessity." (*Proceedings*, n. 38, pp. 129-39.)

[51]Rupert Emerson, *Occasional Papers*, n. 38, p. 64.

CONCLUSION

Similar statements were made countless times by the representatives of India in and out of the UN. As, for example, M.C. Chagla's statement to the Security Council on 5 February 1964, referring to the Pakistani demand for self-determination of the Kashmiri people as "reactionary and obscurantist":

> Now... we must determine what are the connotations of the word "self" in this expression.... It is clear that the "self" contemplated in the enunciation of this democratic principle is not and cannot be a constituent part of a country. It can be operative only when one is dealing with a nation as a whole, and the context in which it can be applicable is the context of conquest or of foreign domination or of colonial exploitation. It would lead to disastrous consequences if the expression were extended to apply to the integral part of any country or sections of its population, or to enable such integrated part of sections of the population to secede. The principle of self-determination cannot and must not be applied to bring about the fragmentation of a country....
>
> In the world today we have innumerable countries in Africa and Asia with dissident minorities. Many of those minorities might like to set up governments of their own. We should have to repaint the map of the world, and many States, Members of the United Nations, could be broken up. Many countries today have populations made up of different races, religions and cultures and the future of the world depends upon the evolution of multi-racial States and nations in different parts of the world. Pakistan's thesis is a reactionary and obscurantist one.... Pakistan would go back to the days when countries permitted only one religion and persecuted those who followed another faith.[52]

The standard defence of Pakistani spokesmen in the Security Council to the above charge has been of a diversionary nature. Take, for example, the stand taken by Z.A. Bhutto at the next meeting of the Council on 7 February 1964. Attacking vehemently

[52]*SCOR*, 1088th meeting, 5 February 1964, pp. 26-7.

Chagla's "scholartic discourse" on the meaning of self-determination, Bhutto went on to remind the delegate of India "of the commitments given by his Government to the people of Kashmir, to Pakistan and to the Security Council."[53] The usual statements cited in this connexion were those of the Prime Minister of India. Nehru, it might be recalled, in a broadcast in 1947 had said: "We have declared that the fate of Kashmir is ultimately to be decided by the people. That pledge we have given not only to the people of Kashmir but to the world. We will not and cannot back out of it." That pledge was cited by Pakistani spokesmen on numerous occasions. The argument appeared to be that Pakistan claimed the right of self-determination for the people of Kashmir not as an inherent right but in view of the Indian Government's pledge. If we look a little carefully into the circumstances in which that "pledge" was made by India, rather than depend upon the bland quote of Nehru's broadcast, it will be clear that it was no pledge of a legal nature, nor was it an unconditional offer by India to Pakistan. This enquiry forms the theme of the next chapter. It is sufficient to say here that Pakistan's claim of self-determination for the people of Kashmir was based on a faulty understanding of the range and meaning of the doctrine of self-determination. Under traditional international law the doctrine had no firm footing. In its modern incarnation it has applicability and relevance only to the process of decolonization.

As a diplomatic or political plank, too, the doctrine of self-determination ill-served the Pakistani spokesmen. For, they had no effective reply to a counter-argument adopted by Indian delegations as to whether Pakistan "was prepared to concede the right of self-determination to the Pakhtoons, the Baluchis or to East Pakistan whose people, as a matter of common knowledge, racially, ethnically and linguistically, are different from the people of the rest of Pakistan."[54]

[53]*SCOR*, 1089th meeting, 7 February 1964, pp. 28-9.
[54]*SCOR*, 1090th meeting, 10 February 1964, p. 13.

CHAPTER SIX

THE "INTERNATIONAL ENGAGEMENT"

THE ALTERNATIVE ACCUSATION against India (when the charge of denial of self-determination fails to convince) was that India was guilty of violating an international engagement embodied in the pledge of plebiscite given to the people of Kashmir, to Pakistan, and to the world. The accusation was hurled at India with varying emotional overtones at successive Security Council meetings. This aspect of the problem was argued out at length in 1957 in the Security Council between Firoze Khan Noon and V.K. Krishna Menon.

The occasion for the new complaint by Pakistan was the alleged attempt of India "to integrate the State of Jammu and Kashmir into the Indian Union... in defiance of the Security Council's clear directives and of its own freely accepted international obligation that the question of the accession of the State of Jammu and Kashmir to India or Pakistan shall be decided by the democratic method of a free and impartial plebiscite to be conducted by the United Nations."[1] Noon argued that the international agreement to which he alluded was contained in the two resolutions adopted by the United Nations Commission for India and Pakistan (UNCIP) on 13 August 1948 and 5 January 1949, and that Pakistan stood "firmly by the international agreement for a plebiscite and is most willing and indeed anxious to implement all its obligations under the terms of that agreement."[2]

A number of delegates endorsed the view of Noon. Nunez Portuondo, the Cuban delegate, was unperturbed over the Indian steps to "integrate" Kashmir into Indian Union, for, according to him, anything "that might be done contrary to the Security Council's resolutions would not have any legal force from the point of view of the Council."[3] Urrutia of Colombia went a

[1]*SCOR*, 761st meeting, 16 January 1957, p. 2.
[2]*Ibid.*, p. 21. [3]*Ibid.*, p. 24.

little further. By way of specific references to the Council's resolution of 30 March 1951, which called upon the parties not to alter the situation, the Colombian delegate claimed:

> This is one of the few cases involving not a recommendation but a decision, since the resolutions of the Security Council are binding decisions, when adopted by an affirmative vote of seven members including the concurring votes of the five permanent members. The resolution of 30 March 1951 is thus valid and binding until modified by the Council.[4]

I

This is a total misreading of the competence of the Security Council in the field of dispute-settlement. It is a well-established principle of the law of the United Nations that resolutions adopted under Chapter VI of the Charter are not binding, even if they have the authority of the concurring votes of the five permanent members. The resolution of 30 March 1951 obviously adopted under Chapter VI, and specifically rejected by India, cannot, therefore, be said to have any legal validity and was not binding on India.

The Chinese delegate, Tsiang, and the Iraqi delegate, Jawad, readily agreed with this erroneous interpretation of the Security Council resolution of 30 March 1951.[5] These statements and interpretations would go down in the annals of the UN as classic examples of contemptuous disregard for the facts of the case and the law appurtenant to the same. They represent a distortion of the so-called commitment that India was alleged to have made to the world community concerning the Kashmir question.

In a marathon speech, lasting almost eight hours, Krishna Menon tried to disprove the above thesis in 1957. The burden of Menon's contentions was that the international engagement, if there was one, was not a "freely entered" one but was contingent upon some prior conditions. Referring to the question of plebiscite Menon said that it was subject to many "ifs" and "whens" which were integral to the whole commitment. He then dealt with the

[4] *Ibid.* [5] *Ibid.*, p. 25.

question of the legality of the Security Council "directives" to prove that they were not obligatory and binding.

As to the nature of "international agreement" allegedly embodied in the UNCIP resolutions of 13 August 1948 and 5 January 1949, one need not go very deep into the documents and the circumstancial evidence to show that it was not binding *per se*. The Commission for India and Pakistan was created by the Security Council resolution of 20 January 1948. The relevant excerpts of this resolution setting forth terms of reference of the Commission read as follows:

> The Security Council,
>
> Considering that it may investigate any dispute or any situation which might, by its continuance, endanger the maintenance of international peace and security; that, in the existing state of affairs between India and Pakistan, such an investigation is a matter of urgency,
>
> Adopts the following resolution:
>
> *A*. A Commission of the Security Council is hereby established, composed of....
>
> *B*. The Commission shall proceed to the spot as quickly as possible. It shall act under the authority of the Security Council and in accordance with the *directions* it may receive from it. It shall keep the Security Council currently *informed* of its activities and of the *development of the situation*. It shall report to the Security Council regularly, submitting its conclusions and proposals.
>
> *C*. The Commission is invested with a dual function:
>
> (1) to investigate the facts pursuant to Article 34 of the Charter;
>
> (2) to *exercise*, without interrupting the work of the Security Council, any *mediatory influence* likely to smooth away difficulties.[6]

The italicized portions of the resolution show that the Security Council created a subsidiary organ to investigate the dispute or situation, which was to act under its authority, and in accordance

[6]S/1100, Annex 1, *SCOR*, 3rd year, Supp. for November 1948, p. 65. (Italics ours.)

with its directions. It was, further, authorized to function as a mediatory organ, without interrupting the work of the Council. Finally, it was enjoined to keep the Council informed of its activities and of the development of the situation. It might be useful to point out at this stage that a subsidiary and subordinate organ thus created by the Security Council cannot be deemed to have more powers than the Council itself. Again, such a subordinate organ must function within the frame of reference worked out by the parent organ.

In a further resolution of 21 April 1948 the Security Council sought to provide the Commission with the "directions" it had envisaged in the earlier resolution. By this resolution the Security Council enhanced the membership of the Commission, and instructed the Commission to proceed at once to the Indian subcontinent and there place its "good offices and mediation" at the disposal of the parties "with a view to facilitating the taking of necessary measures, both with respect to the restoration of peace and order and to the holding of a plebiscite."[7] It recommended to the parties some measures for the achievement of the two objectives enumerated above.

The Government of India rejected the resolution on the grounds, as discussed in the first chapter, that the Council had accorded misplaced emphasis on the issue of plebiscite, whereas its immediate objective should have been to achieve the cessation of hostilities. India's Prime Minister, Jawaharlal Nehru, informed the Council, however, that if "the Council should still decide to send out the Commission . . . the Government of India would be glad to confer with it."[8] Pakistan, too, rejected the resolution.

The question arises immediately as to the legal validity of such a resolution. It is here that the inconsistencies of the Indian application and its perpetuation by the Security Council come out glaringly. According to Article 25 of the Charter the members of the United Nations agree to accept and carry out the *decisions* of the Security Council arrived at in accordance with the Charter. The Security Council is empowered, depending upon the gravity of the situation, to take a variety of decisions. It might decide to act in a situation

[7]S/726, *SCOR*, 3rd year, Supp. for April 1948, pp. 8-12.
[8]S/1100, Annex 3, *SCOR*, 3rd year, Supp. for November 1948, p. 66.

which is a breach of peace, or threat thereof, or against an act of aggression. That is a category under Chapter VII. It might decide to make a recommendation of an inherently non-binding character in a situation not a threat to the peace, etc., as such but the continuation of which is likely to endanger international peace and security. Such is its capacity under Chapter VI of the Charter.

The Security Council, again, has a variety of compulsory means of restoring peace and suppressing an act of aggression under Chapter VII. It can resort to economic sanctions, military measures, or content itself with mere condemnation, as it deems appropriate. It might also make a recommendation under Chapter VII, the non-acceptance of which it might choose to take note with graver concern. It might call upon the parties to desist from certain acts which threaten world peace. It might take provisional measures for the maintenance of peace and forewarn the parties that non-compliance with such measures would be treated as an aggressive act. All this and many other courses of action the Security Council might decide to adopt under Chapter VII of the Charter, and they would be binding on the parties.

The decisions, however, even under Chapter VII of the Charter have a binding nature only in so far as they relate to the restoration or maintenance of peace or the suppression of acts of aggression. But even here, nothing authorizes the Security Council to dictate lasting solutions to the underlying causes of the breach of peace or act of aggression. That precisely is the borderline that differenciates the UN from a World Government. And we have the authority of the International Court of Justice to the effect that the UN is not a super-State. While holding that the UN possesses international personality, the Court said:

> That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State," whatever that expression may mean.[9]

[9] *ICJ Reports*, 1949, p. 179.

The world community is passing through a stage of development where the sovereign States are willing to submit themselves to the authoritative arbitrament of an international organization in actual breaches of peace or acts of aggression, i.e. in the interest, negatively, of the maintenance or restoration of peace or suppression of aggression. But the sovereign States are not willing to subordinate themselves to third-party arbitration—judicial, political, or diplomatic—in removing the causes of war, i.e. disputes and situations the continuance of which is likely to endanger international peace and security. In this field the international organisation, through the Security Council, has only hortatory powers.

That is the rationale behind, and the status of, Chapter VI of the Charter. The Security Council has suasive powers here. It employs a variety of tools to ascertain the facts of a dispute or situation, makes available to the parties a number of diplomatic procedures to settle their disputes, and, as for itself, it serves as a highly sophisticated parliamentary venue to air the grievances of the parties. This role of peaceful settlement of disputes of the Security Council has been so much underestimated until now (in contrast with the overestimation of its peace-enforcement functions under Chapter VII) that some perceptive scholars[10] have urged recently to study ways and means to strengthen this aspect of the UN.

In order that the Security Council be able to make appropriate recommendations for peaceful settlement of disputes or adjustment of a situation, it is empowered to investigate and ascertain the facts. It is not a "right" of the Council to give rise to any corresponding "duty" on the part of the members to facilitate such investigation. It is a power which the Council has to employ judiciously in circumstances where such investigation would be possible. The Council cannot coerce a member-State to admit an investigatory body to function on its territory, when it has only persuasive powers to recommend measures for the rectification of the wrong. To convert this power into a right is to accord the Council authoritative powers in dispute-settlement, which is con-

[10]Inis Claude Jr. deplores the reliance on parliamentary victories in the Assembly than on diplomatic efforts to solve disagreements in the Council, and affirms that the diplomatic function of the Council is of primary importance. (Evan Luard, ed., *The Evolution of International Organization*, London, 1966, pp. 84, 88.)

trary to the letter and the spirit of Chapter VI. Nevertheless, disputant States would not like to give the impression that they are trying to hide something by refusing to grant permission to investigating missions, except in extreme cases.

Some such considerations prompted the Government of India to receive the Security Council Commission, though it had rejected the resolution which purported to give directions to the Commission. Moreover, since the Commission was not only entrusted with the function of investigating the facts of India's complaint and Pakistan's countercomplaint, pertaining to Kashmir, but was also to function as a conciliatory body to secure a cessation of hostilities India had no diplomatic option in the midst of a raging war. It had, however, repudiated the Commission's role for securing a plebiscite, characterizing it as an attempt to put the cart before the horse.

It would appear, thus, that though the function of investigation was of primary importance to the Commission and though it was bound to keep the Security Council informed about the developments in the situation, it concentrated mainly upon its conciliatory role. The first thing that it found on arrival in the subcontinent was the fact that Pakistan had employed since the first half of May 1948 three brigades of its regular army for fighting in Jammu and Kashmir.[11] It sent a confidential cable to the Security Council informing it of the presence of Pakistan's troops in Kashmir.[12] But without seeking a fresh mandate in view of what it described subsequently as "a material change in the situation,"[13] it proceeded to use its influence in bringing about the cessation of hostilities.

The point worth maintaining at this stage is that the Commission's failure to obtain fresh mandate from the Security Council when Pakistan's open involvement was brought to its notice by its Foreign Minister was a serious dereliction of duty. So was it an abdication of authority on the part of the Security Council not to have acted in accordance with the gravity of the new situation.

[11]S/1100, paragraph 40, *SCOR*, 3rd year, Supp. for November 1948, pp. 17, 25.

[12]*Ibid.*, paragraph 53.

[13]See the language of the Commission's resolution of 13 August 1948, which will be discussed in the following pages.

The Charter of the United Nations endows varying grades of competence to the Security Council in different matters. In "disputes" which are likely to endanger international peace it has suasive authority. So also in "situations" which are not exactly "disputes." Where the situation is a mixture of dispute and violence which is not exactly a "threat to the peace, breach of the peace or act of aggression" of the nature of Chapter VII it can choose to ignore the element of violence and proceed to offer its conciliatory machinery for the resolution of the dispute. But when the element of violence escalates into a full-scale war between two sovereign member-States, irrespective of the number of brigades involved and the instruments of destruction used, the Council cannot ignore the employment of force. It ceases to be an "element of violence" and assumes the character of "force in international relations" within the meaning of Article 2, paragraph 4, of the Charter. It is no more a matter "the continuance of which is likely to endanger *the maintenance* of international peace and security" (the terminology employed under Article 33 of Chapter VI), but a matter which *is* a threat to *the* peace, or breach of *the* peace, or an act of aggression.

That kind of a transformation in the situation requires that the Security Council should take due notice of the fact and act afresh with matching severity. The Council failed to do that. If the Council had chosen to disregard the original armed raids by the tribesmen which by itself was a clear act of aggression under international law—it had no option whatsoever when its own organ attested to the fact of Pakistan's open involvement.

II

Influenced perhaps by the "trends" of thoughts in the Council that infinitely the best way to induce the raiders and Pakistan authorities to stop fighting was to offer a plebiscite, the Commission evolved a formula contained in its resolution of 13 August 1948. The resolution records in its preambular part the "opinion that the prompt cessation of hostilities and the correction of conditions the continuance of which is likely to endanger international peace and security are essential to the implementation of its endeavours to assist the

Governments of India and Pakistan in effecting a final settlement of the situation." The modalities of achieving this aim are spelt out in 3 parts. Paragraph A of Part 1 provides for a cease-fire. Paragraph B stipulates that the parties "agree to refrain from taking any measures that might augment the military potential of the forces under their control in the State of Jammu and Kashmir."

Part II relates to the truce agreement. It is this part of the resolution which records the material change in the circumstances which the Commission countenanced on its arrival in the sub-continent. Section A of Part II states:

> *A*.1. As the presence of troops of Pakistan in the territory of the State of Jammu and Kashmir constitutes a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agrees to withdraw its troops from that State.
>
> 2. The Government of Pakistan will use its best endeavour to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistan nationals not normally resident therein who have entered the State for the purpose of fighting.
>
> 3. Pending a final solution, the territory evacuated by the Pakistan troops will be administered by the local authorities under the surveillance of the Commission.

There can be hardly any doubt about what the Commission had in mind when it drafted the above provisions. The Commission wanted as a first step for any truce agreement the withdrawal of Pakistani troops and expected Pakistan to use its best endeavours to secure their withdrawal. The third provision under this section envisaged the restoration of authority to the local government after the withdrawal of the troops. Section B of Part II stipulates:

> 1. When the Commission shall have notified the Government of India that the tribesmen and Pakistan nationals referred to in Part II, A2, hereof have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian

> forces in the State of Jammu and Kashmir, and, further, that the Pakistan forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of their forces from that State in stages to be agreed upon with the Commission.

Thus the withdrawal of the "bulk" of Indian forces according to the resolution was to commence *after* the withdrawal of tribesmen and other irregular Pakistan nationals, and during the withdrawal of Pakistan forces. The element of synchronizing, it must be noted, was linked not only with the withdrawal of the tribesmen but also with the partial withdrawal of Pakistan forces. A balancing element, however, was that the withdrawal of Pakistan troops was unconditional. But this provision itself became a loophole when the tribesmen and other Pakistan nationals who were fighting along with the regular Pakistan forces were absorbed into what later came to be known as "Azad" forces.

The next paragraph, nevertheless, established the question of sovereignty:

> 2. Pending the acceptance of the conditions for a final settlement of the situation in the State of Jammu and Kashmir, the Indian Government will maintain within the lines existing at the moment of the cease-fire those forces of its Army which in agreement with the Commission are considered necessary to assist local authorities in the observance of law and order. The Commission will have observers stationed where it deems necessary.

Law and order in the Indian federal structure is a matter under the jurisdiction of States. The recognition, therefore, that India was to help maintain law and order in the State of Jammu and Kashmir, coupled with its defence responsibilities and the assurances given by the Commission that it would not question the legality of accession or propose any step which impinge on the sovereignty of the State, proves beyond doubt India's claim over Kashmir. It also established the fact that the position of the Pakistani irregulars was that of intruders and the withdrawal of Pakistani regular troops was given a little better consideration for

diplomatic reasons. Again, the Commission was to act not as a referee watching or supervising the withdrawal of the combatants but as an international agency assuring the Indian government that the withdrawal of tribesmen was finished and that the Pakistani forces were also withdrawing so that India could pull out the excess forces not required for maintaining law and order. The competence of the Indian Government to keep forces for purposes of law and order was recognized. The removal of excessive forces was offered only as an inducement for Pakistani forces to be withdrawn completely. In any case, Pakistan did not have any direct access in the matter of withdrawals. It was the Commission which was given the supervisory role.

Part III of the resolution refers to the idea of a plebiscite in the following terms:

> The Government of India and the Government of Pakistan reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people and to that end, upon acceptance of the truce Agreement, both Governments agree to enter into consultations with the Commission to determine fair and equitable conditions whereby such free expression will be assured.

The terminology of the above provision is in the nature of an expression of a wish, a desire to enter into consultations *with the Commission* to determine fair and equitable conditions to ascertain the "will of the people," *upon acceptance* of the Truce Agreement. Firstly, there is no hard and fast commitment to ascertain the will of the people. It is only an expression of a "wish." In all legal systems it is an accepted rule that an enforceable contract does not come into existence unless an expression of a desire or a promise by a party was intended to be followed by legal consequence. Under the English Law of Contract, says Sir William R. Anson, an offer, "in order that it may be made binding by acceptance, must be one which can reasonably be regarded as having been made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was

made."[14] The Indian law of contracts also adopts the same principle. International agreements, likewise, are not created unless the parties intended their expression of wish to have legal consequences.

Secondly, even if it were a commitment it was conditional on the acceptance of a Truce Agreement. If the Truce Agreement was not signed Part III of the resolution would not come into operation. That India accepted the resolution on a clear understanding of that condition can be seen from the correspondence between the Prime Minister of India and the Chairman of the Commission. In a letter dated 20 August 1948 the Prime Minister of India sought some assurances from the Commission, viz.

(1) That paragraph A.3, Part II [dealing with local authorities], of the resolution should not be interpreted, or applied in practice, so as (*a*) to bring into question the sovereignty of the Jammu and Kashmir Government over the portion of their territory evacuated by Pakistan troops, (*b*) to afford any recognition of the so-called "Azad Kashmir Government," or (*c*) to enable this territory to be consolidated in any way during the period of the truce to the disadvantage of the State.

(2) That from our point of view the effective ensurance of the security of the State against external aggression, from which Kashmir has suffered so much during the last ten months, was of the most vital significance and no less important than the observances of internal law and order, and that, therefore, the withdrawal of Indian troops and the strength of Indian forces maintained in Kashmir should be conditioned by this overriding factor. Thus at any time the strength of the Indian forces maintained in Kashmir should be sufficient to ensure security against any form of external aggression as well as internal disorder.

(3) That as regards Part III [dealing with the ascertainment of the will of the people] *should it be decided to seek a solution of the future of the State by means of a plebiscite. Pakistan should have no part in the organization and the conduct of the plebiscite or in any other* matter of internal administration in the State.[15]

[14]William R. Anson, *Principles of the English Law of Contract*, Oxford, 1959 (Edited by A. G. Guest), pp. 30 ff.

[15]*SCOR*, 3rd year, Supp. for November 1948, pp. 35-6. (Italics ours.)

Again, the 5 January 1949 resolution, which was "supplementary" to the 13 August resolution, had the following provisions:

> 1. The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite.
> 2. A plebiscite will be held *when it shall be found by the Commission that the cease-fire and truce arrangement set forth in Parts I and II of the Commission's resolution of 13 August 1948 have been carried out* and arrangements for the plebiscite have been completed....
> 4. After implementation of Parts I and II of the Commission's resolution of 13 August 1948 and when the Commission is satisfied that peaceful conditions have been restored in the State, the Commission and the Plebiscite Administrator will determine *in consultation with the Government of India* the final disposal of the Indian and State armed forces, such disposal to be with due regard to the security of the State and the freedom of the plebiscite.[16]

No better evidence could be adduced to establish the conditional nature of Indian "commitment" to plebiscite than the very terminology italicized in the above resolutions, and the clarifications sought by the Government of India. The question of plebiscite (1) was dependent upon the establishment of a truce, and (2) the Government of Pakistan was to have no direct dealings with the Government of India in that matter.

Speaking about the 5 January resolution of the Commission and India's commitment thereunder Krishna Menon said on 23 January 1957:

> This is a plan of action. It is a blueprint. But you cannot operate it, you cannot pull the trigger on it until Parts I and II are in operation. Part I is in operation; therefore, there is no fighting and, so far as we are concerned, it will remain in operation. But Part II is not in operation; and, what is more, the conditions have been breached before this, without the knowledge

[16]See Appendix VI. (Italics ours.)

of the Security Council and without conveying the information, and afterwards, and is being breached continually. In fact, a division of Kashmir, which is wrong both *de jure* and *de facto*, has taken place.

This is a sheer violation of all the commitments made by the Government of Pakistan to the United Nations. That is the limit of our commitments in this matter.[17]

Menon denounced the continued validity of the resolutions on the grounds that there was no bilateral agreement between Pakistan and India, that the Commission's resolutions were not international agreement "of the type that is a protocol or a final declaration of a conference," that "all the meeting of minds, all the differences between minds constitute a plan that is contingent upon another contingency," that Pakistan had occupied more than 42,000 square miles out of 84,000 square miles of Kashmir territory and that the military equilibrium, that obtained at the time of accepting the resolutions, no longer existed.[18]

By reference to Oppenheim's authority on the law of treaties Menon also cited several other material changes which, presumably, consituted sufficient grounds to raise the doctrine of *rebus sic stantibus.*[19] There is no need, however, to invoke this doctrine to denounce the UNCIP resolutions of 13 January 1948 and 5 January 1949. Once it is established that they were of a conditional nature it automatically follows that no binding obligations arose or existed under such an engagement if the conditions were not fulfilled.

III

The question of the continued validity of the UNCIP resolution can best be examined with the establishment of the constitutionality of such resolutions in the law of the United Nations. What is the position of a resolution adopted by the United Nations or one of its

[17] *SCOR*, 763rd meeting, 23 January 1957, p. 19.

[18] *SCOR*, 762nd-765th meetings, 23-24 January 1957.

[19] Attempts have been made by some Indian authors to avail this plea recently. (See Gururaj Rao, *Legal Aspects of the Kashmir Problems*, Bombay, 1967, pp. 107-11.)

subsidiary organs under international law? It has been seen in the preceding pages that a resolution of the Security Council or its organ adopted in pursuance of its conciliatory functions under Chapter VI of the Charter has no obligatory force *per se*. But, it can be argued that if the parties to a dispute agree to abide by a particular resolution it becomes an international engagement. True, an international treaty can be created by an agreement by two or more parties to follow a certain code of conduct laid down in a resolution of an international organization. But the obligation cannot be total. It depends on the content of the resolution and the intent of the parties promising to adhere by it.

We have seen that the particular resolutions of the UNCIP had envisaged and prescribed a certain code of conduct for the parties. The code of conduct was arranged in a consecutive order. First, there was to be a cease-fire; second, the resolutions envisaged a truce agreement; third, they recorded the "wish" of the parties to decide the future of Kashmir in accordance with the free will of the people. It was made clear by one party, i.e. India, that as for as India was concerned the execution of the wish in Part III was contingent on the carrying out of Part I, and Part III was contingent on the carrying out of Parts I and II. Now, can such a type of document be described as an international agreement?

According to the Draft Articles on the Law of Treaties proposed by the International Law Commission a treaty "means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[20]

Since the resolution was not in the nature of a draft agreement proposed by the Commission and accepted by India and Pakistan it might be straining the language of the Draft definition too much if it were to be regarded as an international agreement or treaty. Moreover, since the resolution involved another party, i.e. the UN, it attains a new dimension. For such categories the Draft Articles of the ILC have a separate provision.

Article 4 of the Draft states: "The application of the present

[20]For text, see *AJIL*, Vol. 61, 1967, p. 263.

articles to treaties which are constituent instruments of an international organisation or *are adopted within an international organization shall be subject to any relevant rules of the organization.*"[21] The relevant rule of the organization, as we have seen above, is that the resolutions of the Security Council under Chapter VI of the Charter are not binding. So we are thrown back once again to the *lex specialis* of the UN resolutions.

If we go a little beyond this generalization it can be seen that there are a number of categories of treaties involving an international organization. The constituent instrument of an international organization is itself a multilateral treaty. The organization can be a party to a treaty along with another organization, State, or a combination of both. It can serve as a forum under whose auspices treaties might be adopted. It can itself draw up a multilateral treaty and open it up for adoption.

More specifically, an organ of the UN, like the General Assembly, can create binding obligations by drawing up conventions, adherence to which would establish treaty rights and duties (e.g. Genocide Convention). It might pass resolutions of a declaratory character, declaratory of the current international law (like the one adopting the Nuremberg principles). It might adopt resolutions of an embryonic legal nature (on outer space, for instance). It might seek to create a higher law through its resolutions (like the ones on decolonization). It might try to evolve a revolutionary norm (as for instance, Resolution 2186 of 15 December 1966 demanding the end of economic disparities among nations). All such resolutions have a significance sometimes legal, sometimes political, and sometimes propagandic. But only such covenants which are adopted within the organization and opened up for accession by member-States are legally binding, and that too when ratified by the requisite majority.

As far as the Security Council is concerned, its competence to create binding obligations lay in the field of world peace and international security, i.ę. under Chapter VII of the Charter. The recommendations it makes under Chapter VI, to repeat, are of a hortatory character. So it was intended by the framers of the Charter.

[21]*Ibid.* (Italics ours.)

The UK and the US delegates especially had affirmed at San Francisco that recommendations made under Chapter VI were not of a compulsory or coercive character.[22] Juristic opinion confirms this view.[23] In fact the authority of the ICJ can be cited to buttress the view. In the *Corfu Channel Case* seven judges writing a concurring judgment rejected the British suggestion that a recommendation by the Security Council in certain cases might create binding obligations.[24]

In such a situation the conditional acceptance of a recommendatory resolution of the Security Council by a member-State cannot be deemed to create an everlasting treaty commitment. The law relating to denunciation, withdrawal, and suspension of treaties is too exacting to be applied to political promises made by nations to recalcitrant opponents in an unsympathetic diplomatic forum. Despite the crescendo of treaties of late, the coming into existence of a treaty is as cumbersome and difficult, if not more, as its denunciation. Any attempt to compress and telescope the formal and substantial stages of the formation of a treaty by attributing binding obligations to political declarations in international forums must be viewed with scepticism.

The offer of plebiscite, alternatively, can be viewed as an inducement suggested by India and clutched hopefully, and tenaciously pursued later, by the UN to get the tribal invasion cleared by Pakistan. It lost its original charm the moment Pakistan itself joined hands with the invaders. Thereupon the Indian interest in the "prize" naturally cooled down. India, rightly, regarded the direct participation of Pakistan in the invasion as a challenge to its territorial integrity and political independence, an affront to, and fraud upon, the UN, which had functioned till that time on the assumption that the Pakistani involvement in the tribal invasion was not so brazen and direct. It chose, however, to ignore this element and concentrated upon an immediate cessation of hostilities. But when even for a simple cessation of hostilities Pakistan demanded

[22] *UNCIO Documents*, Vol. 12, p. 66.

[23] Hans Kelsen, *The Law of the United Nations*, London, 1950, pp. 95-6; Julius Stone, *Legal Control of International Conflict*, New York, 1954, p. 219; L.M. Goodrich and E. Hambro, *Charter of the United Nations*, London, 1949, p. 255.

[24] *ICJ Reports*, 1948, p. 26.

a price the UN Commission, acting as a mediatory body and not as an enforcement authority, chose to concede the price.

The Colombian delegate, Urrutia, narrated the story as to how the Commission's diplomatic efforts to make the price palatable to India bore fruit:

> I would like to point out, in the first place, that the situation which the Commission found on its arrival in Pakistan was this: Pakistan had rejected any solution that did not involve explicit provisions concerning the plebiscite. India, for its part, refused even to consider the idea of a plebiscite until hostilities ceased and the Pakistani forces were withdrawn. The Commission managed to bring about agreement on the cease-fire and the truce as a bridge between those two positions. What was arrived at, therefore, was a compromise solution whereby it was possible to elicit an offer from India to submit the final disposition of Kashmir to a plebiscite. Two points have to be made clear, however: First, the Commission accepted the soverignty of the State of Jammu and Kashmir as a fact and avoided entering into a discussion of the legality or illegality of the act of accession, which meant that it recognized the *de facto* sovereignty of India. Secondly, the Commission never recognized the legality of the presence of Pakistani troops in Kashmir. These points must be stressed in order to appreciate why the Commission ordered the complete withdrawal of the Pakistani forces but only requested India to withdraw part of its forces, while permitting it—and even giving it special rights—to maintain internal order and take charge of external defence. For the same reasons the Commission, when the idea of a plebiscite was discussed, was the first to recognize that Pakistan had no right to take part in drawing up the rules and regulations for the plebiscite, except in an advisory capacity, whereas India was recognized as having the right to be consulted. It was also agreed in principle that the Pakistani forces would be withdrawn, completely and definitely, whereas the withdrawal of the Indian forces was subject to consultations with the Commission.[25]

[25] *SCOR*, 12th year, 768th meeting, 15 February 1957, p. 15.

Urrutia then confirmed the assurance given to Prime Minister Nehru by the Chairman of the Commission, Lozano, to the effect that India's offer of plebiscite, in the Commission's view, would not entail an unconditional commitment if the first and second parts of the resolution of 13 August 1948 were not carried out.[26] He also pointed out that the Chairman of the Commission was unwilling to discuss the legality or otherwise of the accession and was content with recognizing the soverignity of the State *de facto*. This coupled with the letter of the Chairman to the Prime Minister of India, dated 25 August 1948, confirming the Indian interpretation ("that the Commission was not competent to recognize the sovereignty of any authority over the evacuated areas other than that of the Jammu and Kashmir Government") leaves no room for doubt as to the *locus standi* of Pakistan in the Kashmir question.[27]

The point, however, that needs to be stressed in the present context is that the plebiscite was used by the Commission for a dual diplomatic purpose of inducing Pakistan to vacate its aggression and as a climb-down by the Indian Government to keep the negotiations going. It was never intended as a legal commitment. In fact, Urrutia reiterated in the same speech cited above, time and again, that the Commission at no time had intended any legal battles to win in the negotiations. It was, according to him, a purely political compromise.[28]

In the subtle diplomatic maneouvring the UNCIP produced an agreement between the parties hedged in by a host of "ifs" and "whens." Even the simple cease-fire part of the 13 August 1948 resolution was hinged on a further promise that the parties "agree to refrain from taking any measures that might augment the military potential of the forces under their control in the State of Jammu and Kashmir." India, therefore, would not have been guilty of violating the letter and the spirit of the resolution even if it had refused to order a cease-fire after accepting the resolution. For, every day the military potential of the area occupied by Pakistan was being augmented. We have the authority of the UNCIP itself on this aspect.

[26] *Ibid.*
[27] *SCOR*, 3rd year, Supp. for November 1948, pp. 36-7.
[28] *SCOR*, 12th year, Supp., 768th meeting, 15 February 1957, pp. 15-6.

The interim report presented by UNCIP to the Security Council on 9 November 1948 contains in paragraph 40 the information given to the Commission that "the Pakistan Army had at the time three brigades of the regular troops in Kashmir, and that troops had been sent into the State during the first half of May."[29] Reporting failure of its mediatory efforts the Commission noted in its third interim report what it called a "major change" in the military situation brought about by the Azad Kashmir movement "whose fighting forces today number some thirty-two well-equipped battalions," and that Pakistan had used the period subsequent to the cease-fire "to consolidate its position in the Azad territory."[30] That, again, was enough to absolve India of its so-called commitment about a plebiscite.

The very fact that a large chunk of the State of Jammu and Kashmir still remains occupied and the irregular, amorphous Azad Kashmir forces now constitute a regular army is sufficient to defuse the UNCIP resolutions. But even if, for the sake of argument, the engagement, or international agreement as it was called by the Pakistan delegates time without number, were to continue, the massive violations in 1965, by armed infiltrators across the cease-fire line, must be deemed to have erased all the commitments and obligations flowing from the UNCIP resolutions as far as India is concerned.

One can even construe the Tashkent Declaration embodying the agreement to pull the Indian and Pakistan forces back to 5 August 1965 positions as a fresh cease-fire agreement establishing the old cease-fire line. In that case it might be argued that not only Parts II and III of the 13 August 1948 UNCIP resolution were rendered obsolescent by the 1965 war but also that Part I of the same resolution, along with the cease-fire provisions, became obsoloscent. The "demands" made by the Security Council in its resolutions of 20 September, 27 September, and 5 November 1965 were acted upon by parties only to the extent of cessation of hostilities. The withdrawal provisions of these resolutions were not effective. The parties went out of the United Nations to work out a bilateral treaty on the subject. So, what remained of the Security Council's role

[29]*SCOR*, 3rd year, Supp. for November 1948, p. 25.
[30]*SCOR*, 4th year, Sp. Supp. No. 7, Annex 12, paragraphs 203, 225.

in the 1965 war was the securing of a cease-fire on a line distinct from the old cease-fire line. This new cease-fire line stood as on the day, i.e. 22 September 1965, the cessation of hostilities was ordered.

The Tashkent Declaration does not mention the 1949 cease-fire line. It only mentions the positions held by parties before 5 August 1965. The positions held on 5 August just happened to coincide with the positions drawn up in the old cease-fire line. They could have been different. This is a restrictive interpretation of the scope of the Security Council resolution of 1965 and the range and meaning of the Tashkent Declaration. A liberal and better, it is admitted, interpretation of these instruments would be to construe them as restoring the *status quo ante bellum* (*anti bellum 1965*). But the *status quo* cannot be *status quo* of everything prior to war. It can only mean *status quo* of troop positions and territorial occupations.

The rights and duties, claims and counterclaims, concessions and demands of the parties concerned in a *status quo anti bellum* can no longer, under modern international law, be regarded as frozen. The Kellogg Briand Pact and the Charter of the UN taint these claims and counterclaims, concessions and demands, rights and duties in accordance with the fact as to whether the *bellum* has been *legale* or aggressive. An aggressor suffers certain disadvantages. The nearest approximation to the subject under traditional international law is the discussion on the effect of war on treaties.

IV

The general rule is that whether or not a particular treaty is abrogated by the outbreak of war between the parties depends on the intention of the parties at the time when they concluded the treaty, rather than on the nature of the treaty which they concluded.[31] But since tracing the intention of the parties in certain circumstances might be difficult one has to fall back upon judicial decisions and practice of States. Sir Arnold McNair has analyzed the State practice and judicial decisions in his monumental work on the law

[31] Cecil Hurst, "The Effect of War on Treaties," *BYIL*, Vol. 2 (1921-22), pp. 37-47.

of treaties as follows.[32] There is no inherent judicial impossibility either (*a*) in the formation of treaty obligations between two opposing belligerents during war, or (*b*) in the continuance during war of obligations formed before the war. Under the first category are subsumed agreements regulating the conduct or conclusion of war. The second category covers agreements which are manifestly intended by the parties to be unaffected by the outbreak of war.

The traditional treaty law, as formulated by Lord McNair, is that a political treaty to which the opposing belligerents are parties is *ipso facto* abrogated by the outbreak of war. Treaties expressly made applicable to a state of war; treaties declaring, creating, or regulating permanent rights or a permanent regime or status are unaffected. Included in the latter type are treaties connected with soveriegnty and status and territory, such as those created or recognized by a treaty of peace, a treaty of cession, a boundary treaty, and so forth. Again treaties creating vested proprietary rights of nationals and capitulations are unaffected.

There are a certain type of treaties which are suspended for the duration of the war as, for instance, extradition treaties. The law is well settled on the effect of war on commercial treaties. Pre-war commercial treaties between opposing belligerents suffer automatic abrogation.

Law-making treaties, meaning those which create rules of intertional law for regulating the future conduct of the parties, survive a war, whether all the contracting parties or only some of them are belligerents. McNair cites as example the Declaration of Paris (1856), Hague Convention II (1907) for the Limitation of the Employment of Force for the Recovery of Contract Debts, and the Peace Pact of Paris (1928).

This is the law developed in the course of the last few centuries when war was more or less considered a sovereign prerogative. The outlawry of war necessarily must be assumed to have affected the law relating to treaties. It would have been noticed that the law expounded above by Lord McNair uses the standard terminology of war, belligerents, etc. Since the inception of the League of Nations and the signing of the Peace Pact of Paris the concepts of

[32]A. McNair, *The Law of Treaties*, Oxford, 1961, pp. 695-728.

belligerency and belligerent "rights" have undergone radical changes.

This difference is noticeable in the Harvard Research prepared in 1939 on the Rights and Duties of States in case of Aggression.[33] The Draft states in Article 2 that by "becoming an aggressor, a State does not acquire rights or relieve itself of duties." Article 3 clarifies the position further: "1. Subject to Article 14, an aggressor does not have any of the rights which it would have if it were a belligerent. Titles to property are not affected by an aggressor's purported exercise of such rights."

Under Article 4 an aggressor does not have any of the rights which would accrue to a State not an aggressor as the result of its use of armed force. Paragraph 2 of the same article lays down that "situations created by an aggressors' use of armed force do not change sovereignty of other legal rights over territory." More important is Article 5 which states: "By becoming an aggressor, *a State loses the right to require other States to perform the obligations of executory treaties, but is not relieved of the duty to perform the obligations of such treaties;* executed treaties are not affected."[34] Another provision of great significance in the Harvard Draft is Article 14 which prescribes that humanitarian rules concerning the conduct of hostilities prescribed by international law or a treaty would apply to the aggressor and the victim thereof.

The change in the belligerent rights became more marked after World War II and the signing of the UN Charter. Noticing this change Professor Lauterpacht wrote that "war has ceased to be a right which sovereign States are entitled to exercise at their unfettered discretion. War undertaken in violation of these enactments (namely, the Covenant of the League of Nations, the Pact of Paris, and the Charter of the United Nations) is an unlawful and criminal, not only an immoral, act."[35]

Consequently, the view, held with virtual unanimity hitherto,

[33]*AJIL*, Supp., Vol. 33, 1939, pp. 827-30.

[34]Italics ours.

[35]H. Lauterpacht, "Rules of Warfare in an Unlawful War," *Law and Politics in the World Community*, Berkeley and Los Angeles, 1953, pp. 89-113; see also "The Limits of the Operation of the Law of War," *BYIL*, Vol. XXX, 1953, pp. 206-43.

that the rules of war apply also in an illegal war,[36] came to be applied discriminately. The humanitarian rules which form the bulk of the laws of war continued to be applied to wars of whatever origin. This was because of their service in the prevention or diminishing of human suffering. As Lauterpacht observed, "unless hostilities are to degenerate into a savage contest of physical forces freed of all restraints of compassion, chivalry, and respect for the dignity of man, it is essential that the accepted rules of war in that humanitarian sphere should continue to be observed."[37] Apart from the Geneva Conventions which embody the above rule, there are a host of cases decided by a number of international and national military tribunals which have recognized this rule.[38]

In contradistinction to the unchanged law of humanitarian character even after the outlawry of war are some rules of war which necessarily are affected by the illegal initiation of war. That is, after the cessation of hostilities, there is room for the application of the principle that in certain spheres no rights and benefits can accrue to the aggressor from his illegality. Thus it follows from the principle *ex injuria jus non oritur* that a peace treaty imposed by the victorious aggressor has no legal validity. This is so notwithstanding the rule of orthodox international law which disregards the vitiating effect of duress in the conclusion of treaties. For, that rule can reasonably be applied only to a war which the victor is entitled to wage.[39]

On the same basis the modern law denies title to the aggressor over property acquired by conquest. The same considerations apply to yet another consequence of the illegality of aggressive war, namely, that the very act of initiating and waging war has, after the war, become the subject of a criminal charge and criminal responsibility. The Nuremberg Charter and the adoption of the principles thereof by the General Assembly bear ample testimony

[36]Embodied in Article 3 of all the four Geneva Conventions of 1949.

[37]Lauterpacht, *op. cit.*, first citation, p. 92.

[38]*US* v. *Wilhelm List et al., The Zuke Case, The Case of General Christiansen; The Grauser Case*, etc. These and other cases are discussed in Lauterpacht's two articles cited above.

[39]This change has been duly recognized in the ILC Draft on the Law of Treaties under Articles 48 and 49. (See *AJIL*, Vol. 61, 1967, pp. 406-9.)

to this principle. The post-World War II literature[40] on the subject thus shows that while compelling reasons of humanity make it necessary for the continued applications of that part of the laws of war which is humanitarian in essence, it is unjust to require that the aggressor waging an unlawful war should be able to rely on rules of warfare for enriching himself by acquiring title over territory. In addition to that a discriminatory application of the protection of the laws of war seems desirable, as Professor Quincy Wright points out, depending on whether the action has a legal character of defence, enforcement, or aggression.[41]

The development of the doctrine of refusal to recognize the fruits of aggression can be traced to the US reaction to the Manchukkuo Affair of 1931-32. In pursuance of the Japanese occupation of Manchuria a separate State was sought to be established called the State of "Manchukuo." The US Government refused to grant it recognition on the ground that the US

> cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, of the territorial and administrative integrity of the Republic of China.... It does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[42]

It might be pointed out that the Covenant of the League of Nations also prescribes the same course. Under Article 10 of the

[40]In addition to the articles cited in n. 36 and n. 42, see L. Oppenheim, *International Law* (Ed. by H. Lauterpach), London, 1940, Sixth Edition, Vol. 2, p. 150; C.C. Hyde, *International Law*, Boston, Mass., 1947, Revised Second Edition, Vol. 3, p. 1693; H. Lauterpacht, "The Grotian Tradition in International Law," *BYIL*, Vol. 23, 1946, p. 39; "Rights and Duties of States in Case of Aggression," *AJIL*, Vol. 22, 1939, pp. 820-909.

[41]Quincy Wright, "The Outlawry of War and the Law of War," *AJIL*, Vol. 47, 1953, p. 374.

[42]Hackworth, *Digest of International Law*, Vol. 1, Washington D.C., 1940, pp. 333-8.

Covenant, the "Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." On 11 March 1932, the Assembly of the League of Nations adopted a resolution which declared that it was "incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[43]

The above view was given currency by what came to be known as the Stimson Doctrine. On the initiative of Secretary of State, Stimson, nineteen American States (including the US) transmitted on 3 August 1932 to the governments of Bolivia and Paraguay a declaration which stated that "the American nations further declare that they will not recognise any territorial arrangements of this controversy [the Chaco] which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms."[44] The Stimson doctrine gained wide acceptance in inter-American relations and came to be incorporated in treaties subsequently adopted. Mention might be made of the provisions in the "Argentine Anti-War Treaty" signed at Rio de Janeiro on 10 October 1933, whereby the parties agreed that they "declare that as between the high contracting parties territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms."[45]

The inter-American concern for the denial of fruits of aggression to the aggressor was reiterated at the Eighth International Conference of American States in 1938 "as a fundamental principle of American public law, no validity shall be given, nor shall there be juridical effects to the occupation, or the acquisition of territories, nor any other modification or territorial or frontier amendment through conquest by force, or which is not obtained by peaceful means."

[43] *Official Journal*, League of Nations, Sp. Supp. 101, 1932, pp. 87-8.

[44] Hackworth, *op. cit.*, Vol. 1, p. 432.

[45] Cited in W.W. Bishop Jr., *International Law, Cases and Materials*, New York, 1953, p. 283.

At the same conference, it was again declared that "the use of force as an instrument of national or international policy is not considered licit."[46] The thesis which originated as the Stimson Doctrine culminated in 1948 in the Charter of the Organization of American States, Article 17 of which states: "The territory of a State is inviolable; it may not be the object . . . of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No *territorial acquisitions or special advantages* obtained either by force or by other means of coercion, shall be recognized."[46a]

The origin and development, thus, of the doctrine that denies fruits of aggression to the aggressor is a logical corollary to the prohibition of war in international law. With the outlawry of war the territorial claims based on war become incompatible. As the prohibition assumed greater gravity obliterating the shades that differentiate war from aggression, and as aggressive war came to assume a criminal character under the law propounded by the International Military Tribunals in the wake of World War II, the denial of fruits of aggression must be presumed to have acquired greater validity.[47] None, after the establishment of the UN and the adoption of its Charter can maintain that territorial changes obtained through force of arms have legal validity.

CONCLUSION

Having thus established that under modern international law territorial changes wrought by the employment of armed force have no legal validity and that an aggressor, by its aggression, loses the right to require the performance of obligations under an executory engagement, the position of Pakistan *vis-a-vis* the occupied portion of the State of Jammu and Kashmir comes out clearly as untenable. Secondly, even if, for argument's sake, the UNCIP resolutions of

[46]See Valencia's (Ecuador) speech in the General Assembly for a neat summary of the Latin-American endeavours in this direction. (*GAOR*, A/PV 1463, 14 November 1966, pp. 11-25.)

[46a]*United Nations, Treaty Series*, Vol. 119, pp. 50 ff.

[47]C.A. Pompe, *Aggressive War, An International Crime*, The Hague, 1923, *passim*.

13 August 1948 and 5 January 1949 are construed as creating an international engagement, the obligations arising therefrom for India must be deemed to vanish after the fresh act of aggression in 1956. Pakistan cannot claim any right under those resolutions to require India to perform any obligations under those resolutions.

Does India, then, have any obligation to hold a plebiscite *vis-a-vis* the United Nations? We have seen in the preceding chapter tha plebiscite as a tool of self-determination for the people of Kashmi is hardly in consonance with the conception of self-determination as envisaged and evolved by the framers and participants of the UN. Even in the field of decolonization self-determination has come to be interpreted in UN practice as nothing short of independence. What does a plebiscite offer for the people of Kashmir? Independence? No, it is the so-called right to decide as to which country, India or Pakistan, to accede to. That is no self-determination. That is essentially a question of secession. For, as the UNCIP had conceived, plebiscite was to be a right of the people of Kashmir to choose to adhere to the accession to India or to express a wish to be relieved of the accession to join Pakistan. As far India is concerned, it is a simple question of secession.

Has the United Nations any competence to require a member-State to cede a part of its territory to another in the interest of promoting goodwill and cooperation among nations, or even in the interest of peace and security. The obvious answer would be in the negative. Howsoever laudable is the object of promoting the "democratic" ideal of a "free and impartial plebiscite," as the Security Council reiterated times without number in its resolutions concerning this subject, the fact is that the United Nations is not, and was not conceived to be, concerned with the promotion of democratic ideals in the territories of its member-States. The Organization, on the other hand, by its very universality of membership, was desired to be an association of member-States with varying ideologies and politico-economic systems. As Professor Wolfgang Friedmann affirmed recently, the "most basic principle of international law is the equal claim to intergrity of all states, regardless of their political or social

ideology."[48] And the United Nations is an institutional reflection of this basic principle.

As a peace-and-order-oriented general international organization the UN cannot assume upon itself the role of a promoter of democratic ideals. The democratic ideals, for one thing, have a different connotation for different groupings in the United Nations. The Communist countries feel that the UN should uphold their "wars of national liberation," and a strong section of Western scholars believe that use of armed force in the interest of promoting "human dignity" must be construed in a liberal manner. The UN cannot afford to be a party to such attitudinal clashes, nor has it the competence, legally and politically, to undertake such hazardous ventures.

If the United Nations, therefore, had used the plebiscite in the Kashmir problem as a political and diplomatic "bridge," India cannot be said to have made a legal commitment. Moreover, an offer in the nature, admittedly, of an inducement to seek a *status quo anti bellum* in the 1948 war cannot survive another aggressive war in 1965. The Tashkent Agreement was signed without any reference to the *plebiscite* in Kashmir (it only refers in Article 1 to the *discussion* of Jammu and Kashmir when "each of the sides set forth its respective position"). Therefore, the Indian obligations, if any, in this regard *vis-a-vis* both Pakistan and the UN, must be regarded as having ended.

[48]Wolfgang Friedmann, "Intervention, Civil War and the Role of International Law," *Proceedings, ASIL*, 1965, p. 67; Quincy Wright, "Subversive Intervention," *AJIL*, Vol. 54, 1960, p. 531.

CHAPTER SEVEN

CONCLUSIONS

THE PRIMARY PURPOSE of the United Nations is the maintenance of peace and security. The dispute-settlement machinery provided for in Chapter VI of the Charter is aimed at eliminating the causes of frictions that lead to war. Chapter VII of the Charter has in it an enforcement machinery. The UN also contains a machinery for what has come to be called "peace-building" purposes, i.e. contributing to the economic and social welfare of the nations.

In keeping with the changing structure of international society and the modified needs of the present-day world (the revolution of rising expectations and the growing gap between the rich and the poor), peace-building activities are getting accentuated.[1] And conversely its peace-keeping role is getting shrunk owing to several reasons, prominent among them being the interaction of super-powers in and outside the UN. It is well known that the UN because of its congenital debility (veto) and because it is not a super-State with all the overwhelming paraphernalia of force, cannot be effective in promoting peace in conflicts involving, directly or indirectly, the super-powers.[2] As the peace-enforcement function, the dispute-settlement machinery also gets affected depending upon the involvement of the permanent members of the Security Council in particular disputes or situations.

To an international lawyer the failure of the UN in solving the Kashmir problem is attributable to its misplaced emphasis on what the Pakistan delegates like to call the "basic" issues at the expense of what an objective observer called the "fundamental postulates"

[1]See Secretary-General U Thant's address to the Seminaron Peaceful Change, Institute of Man and Science, *The Journal*, Vol. 2, 1966, pp. 3-5.

[2]Rahmatullah Khan, "Collective Security vs. Preventive Diplomacy, the Role of the United Nations in the Maintenance of International Peace and Security," *IJIL*, Vol. 4, 1964, pp. 408-27.

of the problem.[3] Knowingly or unknowingly, the delegates in the Security Council in 1948 committed the Organization to this error. Whatever might have been the political motivations, the present writer is inclined to attribute it to a basic ignorance of the law of the Charter.

India had gone to the UN with a complaint of Pakistan complicity in the tribal raids in Kashmir, specifically describing Pakistan's action as "an act of aggression," and requested the UN to call upon Pakistan to stop giving aid and assistance to the tribesmen. That was the operative part of the complaint. Only in the context of a background leading to its complaint India mentioned its offer of plebiscite subject to the condition of withdrawal of Pakistan troops and raiders, etc. Pakistan, on the other hand, denied the charge of abetment and involvement, and made a countercomplaint of India's aggression in several Indian States, which charges the Council treated as too frivolous for consideration.

The members of the Security Council should have known that organizing, supporting, or even allowing armed raids across international boundaries was clearly contrary to international law and the law of the Charter as contained in Article 2, paragraph 4. Instead of calling upon Pakistan unconditionally to take all measures to prevent armed tribal raids across its territory, the Security Council made itself concerned, on the UK-US initiative, to evolve a formula to persuade the tribal raiders supposed to be fired by the ideals of freedom and self-determination, rather than *coerce* them into retreat. The Council clutched at the straw of plebiscite flown into the air by an unsuspecting India.

That was the first error of the Security Council, i.e. evasion of the charge of indirect and direct aggression. The subsequent statements of the delegates, especially that of the Chinese delegate, show that it was done deliberately. Recalling in 1957 as to how the members of the Council tried to grapple with the problem Tsiang stated:

> I hope that members of this Council today will take the time to read the records of those years. No member of the Council

[3]Michael Brecher, "Kashmir: A Case Study in United Nations Mediation," *Pacific Affairs*, Vol. 26, 1953, p. 207.

> ever gave serious consideration to either charge, the charge of India or the charge of Pakistan. There never was a proposal made dealing specifically with aggression. In fact, there was no systematic or serious consideration of that charge and of the countercharge of aggression. The members of the Council, without consultation, all came to the same conclusion, that the charge of aggression should be bypassed. That charge was never taken up, never sifted, never even given serious consideration; I believe it was very wise of the Council to bypass that charge.[4]

That was the genesis of all the troubles and frustrations that the UN encountered in subsequent years. The UN cannot, and must not, bypass a charge of aggression. As Krishna Menon dramatically reminded the members of the Council at the end of his marathon speech in 1957, the Charter *enjoins* upon the Council "an action consistent with the crime of invasion."[5] It cannot succeed in its conciliatory role by brushing the ugly fact of aggression under the carpet. There cannot be a compromise with aggression. That was, if we are permitted to call it, the original sin that vitiated its conciliatory efforts.

The story of the UN attempts at conciliation in the dispute over Kashmir resembles the Greek tragedy of Sisyphus and the avalanche. The UN seems to be eternally condemned to the role of a Sisyphus pushing the rock of plebiscite over to the cliff. Sisyphus fails, but not because of the inherent hopelessness of the task. India is blamed for doing some such thing from atop its summit of sovereignty.

The very first thing that the UNCIP found on its arrival in 1948 was the Pakistan Foreign Minister Sir Zafrullah Khan's admission that Pakistan's regular troops were fighting in Kashmir since mid-May of that year. If there ever was any need to investigate and establish Pakistan involvement in the invasion it had ended after that admission. But the Commission chose to proceed with its conciliatory function despite the admitted aggressive act. The difficulty with the procedure and attitude adopted by the Council

[4] *SCOR*, 12th year, 765th Meeting, 24 January 1957, p. 13.
[5] *SCOR*, 12th year, 764th Meeting, 24 January 1957, p. 46.

and the Commission was that while conciliation presupposes impartiality and the equal treatment of the parties the situation demanded an uncompromising attitude towards a party which was unmistakably guilty of violating the estalished norms of international law and the Charter. Yet, the Commission tried to do some tight-rope walking in order to achieve the pressing need for a cease-fire.

Without going to the length of condemning Pakistani participation in the invasion as an act of aggression, which it felt it was not competent to do, the Commission nevertheless noted the presence of troops of Pakistan in Kashmir as constituting "a material change," and called upon Pakistan to withdraw its troops unconditionally. It urged the Government of Pakistan, next, to "use its best endeavours to secure the withdrawal ... of tribesmen." It did the balancing act of linking, however, the beginning of the withdrawal of the "bulk" of Indian troops with the process of the withdrawal of Pakistani troops, and after the completion of the withdrawal of the tribesmen. As the next paragraph of the resolution of 13 August 1948 and the assurances given separately show, the Commission, nonethless, did recognize the right of India to maintain sufficient troops for the purpose of law and order. The sovereignty of the State of Kashmir and the legality of accession were unchallenged.

The resolution, again, of 5 January 1949, which embodied "principles," "supplementary" to the Commission's resolution of 13 August 1948, specifically laid down that the "plebiscite" will be held after the cease-fire and truce agreements envisaged in the earlier resolution were carried out. But it committed an error in linking the above arrangement with the need to make preparations for a plebiscite. That provision was pursued by the delegations in the Security Council with undue haste. We have the authority of Urrutia, the Colombian delegate, that it was a grave error.

Urrutia, explaining how the Commission, on which Colombia was represented, scored an unexpected success initially in getting India agree to a plebiscite, made a few revealing remarks on 15 February 1957 in the Security Council:

> Unfortunately, the atmosphere of confidence that had been achieved was lost owing to a series of errors and incidents which it is advisable to recall so that they will not recur.
>
> The first was the appointment of the Plebiscite Administrator. As it is now nine years ago, I think it is worthwhile to explain what happened. In the Commission the Colombian delegation urged that the Plebiscite Administrator should be a neutral, that being the only way to induce India to abide by the offer which had been obtained with such difficulty. Unfortunately, other delegations had explicit instructions to urge that the Plebiscite Administrator should be a United States citizen. My delegation suggested, in private conversation also, that we should accept the Indian Government's suggestion that the President of the International Red Cross should be appointed Plebiscite Administrator. If, at that time, we had accepted the Plebiscite Administrator proposed by India, the President of the International Red Cross, the Plebiscite would already have been held. Instead of that, Admiral Nimitz waited nine years in New York for an opportunity to organise the plebiscite. But these errors are delicate matters, because an apparent diplomatic victory, obtained at a certain time, served propaganda purposes, but in reality undid all the work the Commission had accomplished.[6]

The fundamental postulates of the legality of the presence of Indian troops and the illegality of the presence of the troops and tribesmen belonging to Pakistan and the question of sovereignty of the State of Kashmir, accepted by the Commission, were sought to be drowned in yet more "diplomatic victories" in the subsequent conciliatory efforts.

Under the McNaughton Proposals, for instance, the question of Plebiscite offered as an inducement got primary consideration, as it were. And the Security Council sought to solve the demilitarization deadlock by according to Pakistan a measure of equality of treatment. Paragraph 2 of the Proposals in this connexion might be cited:

[6] *SCOR*, 12th year, 768th Meeting, 15 February 1957, p. 17.

> There should be an agreed programme of progressive demilitarization, the basic principle of which should be the reduction of armed forces on either side of the cease-fire line by withdrawal, disbandment and disarmament in such stages as not to cause fear at any point of time to the people on either side of the cease-fire line....
>
> (*a*) The programme of demilitarization should include the withdrawal from the State of Jammu and Kashmir of the regular forces of Pakistan; and the withdrawal of the regular forces of India not required for the purposes of security or for the maintenance of local law and order on the Indian side of the cease-fire line; also the reduction, by disbanding and disarming, of local forces, including on the one side the Armed Forces and Militia of the State of Kashmir and, on the other, the Azad Forces.[7]

The sovereignty of the State of Jammu and Kashmir, undisputed by the UNCIP, was sought to be eroded in the last clause of the above provision. The aggressor, under these proposals, got a fair and equitable treatment. Also the legally constituted Armed Forces and Militia of the State of Kashmir were to be dissolved along with the invading tribesmen and Pakistan nationals who by then had metamorphosed into the "Azad Forces."

Sir Owen Dixon, again, fell into the same error of compromising with aggression, with one difference, however. He recognized, and stated so specifically, that the crossing of the frontier of the State of Kashmir on 20 October 1947 by hostile elements "was contrary to international law," and "that when, in May 1948, as I believe, units of the regular Pakistan forces moved into the territory of the State that too was inconsistent with international law."[8] Sir Owen, a jurist who occupied the highest judiciary post in Australia, must have preferred the understatement deliberately in order to promote his mediatory function more effectively. But the solution he offered of a partial plebiscite and/or partition of the State was probably the climax of the UN mistakes. History would have condemned the UN for awarding prizes to those nations which, according to its own representative, had violated international law.

[7] S/1453, 5 February 1960.
[8] S/1791, 15 September 1950.

Dr. Graham was lost in working out steps towards demilitarization and fixing up dates "synchronizing" withdrawals, suggesting in his last report the stationing of UN troops to ensure free and impartial plebiscite.[9] And Gunnar Jarring ended up by offering arbitration in the dispute between India and Pakistan about the fulfilment of Part I of the UNCIP resolution of 13 August 1948.[10]

The mediatory efforts of the UN were foredoomed to failure as they were based on the inherently impossible task of rewarding a party which had broken the law of the Charter and international law, by offering equality of treatment on the question of withdrawal, and *locus standi* in the question of plebiscite. That, to repeat, was the gravest error committed by the UN and perpetuated by its Representatives. If that was an error which the UN committed knowingly, the infatuation with the idea of a plebiscite must be regarded as an unconscious error. To establish this we need only go back to Tsiang's reminiscences in 1957. With a disarming simplicity the Chinese delegate posed the problem and answered himself:

> Furthermore, what is a plebiscite? A plebiscite, in terms of the Charter, would mean the self-determination of a people. Self-determination is expressed through a plebiscite. I would say that all Members of the United Nations, by becoming Members, by subscribing to the Charter, would have to accept the principle of plebiscite, if we accept a plebiscite we mean, of course, a fair and impartial plebiscite. In regard to this point, that a plebiscite must be fair and impartial, I remember very well a sentence that Mr. Noel-Baker said to the Council during that period. He told us that the plebiscite not only must be fair and impartial in reality but it must be fair and impartial even in appearance. This fairness and impartiality could sway the passions of peoples. It could decide the question of peace or war.[11]

The statement might be read with reassurance by Tsiang's

[9]See for Dr. Graham's reports, S/2375, 15 October 1951; S/2448, 18 December 1951; S/2611, 22 April 1952; S/2783, 19 September 1952; S/2967, 27 March 1953; S/3984, 13 March 1958.

[10]S/3821, 29 April 1957.

[11]*SCOR*, 12th year, 765th Meeting, 24 January 1957, p. 14.

own 10 million native Formosans whose plaintive cry for self-determination is lost in the vociferous rival claims on the island by the Communist regime in mainland China and those Nationalist Chinese who with less than 18 per cent of the population hold the political power.[12] The statement also might embolden the Rap Browns and Stokely Charmichaels in the United States. However, what matters in the present context is Tsiang's interpretation of the UN Charter.

The statement evidently was a delusion born out of a faulty understanding of the Charter and ignorance of the place of plebiscites in international law. It has been conclusively established in the chapter dealing with the subject of self-determination that plebiscites never had the wholehearted support of statesmen; that no rule under international law prescribed a plebiscite before secession; that the principle of self-determination, mentioned by way of passing reference in the UN Charter, but developed in practice as a "right" of dependent peoples, was operative only in the context of decolonization. It was asserted, by reference to the authority of Rupert Emerson, that outside the context of decolonization "all peoples do *not* have the right of self-determination, they have never had it, and they never will have it."[13] The UN was, thus, committed to a wrong remedy in a wrong situation.

Another basic misreading of the Charter done by the delegates, which in turn led to an erroneous pursuit by the UN, related to the so-called Indian "commitment" over the future of Kashmir. The misinterpretation comes out glaringly from the statements made in 1957 in the Council when Pakistan complained that the formation in Kashmir of the Constituent Assembly constituted a violation of the UN resolutions.

The account given of these proceedings in the opening pages of the chapter on "International Engagement" reveals that the delegates regarded the UN resolutions on the question of Kashmir as binding,

[12]See *Ilha Formosa, A Magazine for Formosan Independence Movements* (published in Philadelphia by the United Formosans for Independence), Vol. 1, No. 3, Winter 1964, p. 4.

[13]Rupert Emerson, "Self-Determination Revisited in the Era of Decolonization," *Occasional Papers in International Affairs*, No. 9, Harvard University Center for International Affairs, December 1964, p. 64.

creating a regime of law which could not be altered unilaterally by India, and as having frozen the status of Kashmir, whereas, as shown in the same chapter, the UN resolutions under Chapter VI were not binding. The sovereign status of Kashmir and the instrument of accession were not challenged by the UNCIP which succeeded in obtaining agreement of India and Pakistan to its resolutions of 13 August 1948 and 5 January 1949. India had agreed to the idea of plebiscite, i.e. for giving a choice to accept the accession or to opt out of it to go to Pakistan, only on condition that Pakistan "vacates aggression"—a phrase that came later into currency to denote the truce agreement provisions of the resolution of 13 August 1948. For that reason, any question of opening up instrument of accession—accepted by the UN through its organ, the UNCIP, and not accepted, of course, by Pakistan, which was immaterial in connexion with the creation of a special regime of law, or freezing the future of Kashmir—was dependent upon that condition. Hence the freeze on the future of Kashmir would not come into existence by the UN merely passing a few non-binding, exhortatory resolutions.

As for the continued validity of the UNCIP resolutions, none familiar with the literature on aggression and the rights and duties of States in case of aggression could hold that India continued to be under the obligation of a plebiscite, held out as an inducement to restore the status quo *ante bellum* of 1947-48—even after a new aggressive *bellum* in 1965. It is one of the basic principles of international law, which took root during the interwar period and came to be firmly established after the adoption of the UN Charter and the Nuremberg Trials, that a nation which violates an international boundary—a cease-fire line also being considered so for purposes of international law—by an open movement of its military forces or by an indirect method of sending armed infiltrators in large numbers, commits an act of aggression. It is also an elementary norm of modern international law that a State which commits such an act of aggression must be denied the benefits of aggression and the right to demand of the victim of aggression any obligations arising from any earlier executory treaties.

Even if the plebiscite "commitment" under the UNCIP resolutions was considered a binding obligation (which it was not) and

even if these resolutions are construed as executory treaties (which they were not) the war of 1965 must be deemed to have extinguished any such commitment. Or, at least, Pakistan, which was found by the UNMOGIP to have sent armed infiltrators across the CFL commencing on 5 August 1965, must be deemed to have lost the right to require, or invoke, the performance of the so-called obligations.

APPENDIXES

APPENDIX I

RESOLUTION OF THE SECURITY COUNCIL 17 JANUARY 1948

The Security Council,

Having heard statements on the situation in Kashmir from representatives of the Governments of India and Pakistan;

Recognizing the urgency of the situation;

Taking note of the telegram addressed on 6 January by its President to each of the parties and of their replies thereto; and in which they affirmed their intention to conform to the Charter;

Calls upon both the Government of India and the Government of Pakistan to take immediately all measures within their power (including public appeals to their people) calculated to improve the situation and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation;

And further requests each of those Governments to inform the Council immediately of any material change in the situation which occurs or appears to either of them to be about to occur while the matter is under consideration by the Council, and consult with the Council thereon.

APPENDIX II

RESOLUTION OF THE SECURITY COUNCIL 20 JANUARY 1948

The Security Council,

Considering that it may investigate any dispute or any situation which might, by its continuance, endanger the maintenance of international peace and security; that, in the existing state of affairs between India and Pakistan, such an investigation is a matter of urgency;

Adopts the following Resolution:

A. A Commission of the Security Council is hereby established composed of representatives of three Members of the United Nations, one to be selected by India, one to be selected by Pakistan, and the third to be designated by the two so selected.

Each representative on the Commission shall be entitled to select his alternates and assistants.

B. The Commission shall proceed to the spot as quickly as possible. It shall act under the authority of the Security Council and in accordance with the directions it may receive from it. It shall keep the Security Council currently informed of its activities and of the development of the situation. It shall report to the Security Council regularly, submitting its conclusions and proposals.

C. The Commission is invested with a dual function: (1) to investigate the facts pursuant to Article 34 of the Charter; (2) to exercise, without interrupting the work of the Security Council any mediatory influence likely to smooth away difficulties, to carry out the directions given to it by the Security Council, and to report how far the advice and directions, if any, of the Security Council, have been carried out.

D. The Commission shall perform the functions described in clause C: (1) in regard to the situation in the JAMMU and KASHMIR State set out in the Letter of the Representative of India

addressed to the President of the Security Council, dated 1 January 1948, and in the letter from the Minister of Foreign Affairs of Pakistan addressed to the Secretary-General, dated 15 January 1948; and (2) in regard to other situations set out in the letter from the Minister of Foreign Affairs of Pakistan addressed to the Secretary-General, dated 15 January 1948, when the Security Council so directs.

E. The Commission shall take its decision by majority vote. It shall determine its own procedure. It may allocate among its members, alternate members, their assistants, and its personnel such duties as may have to be fulfilled for the realization of its mission and the reaching of its conclusions.

F. The Commission, its members, alternate members, their assistants and its personnel, shall be entitled to journey separately or together, wherever the necessities of their tasks may require, and, in particular, within those territories which are the theatre of the events of which the Security Council is seized.

G. The Secretary-General of the United Nations shall furnish the Commission with such personnel and assistance as it may consider necessary.

APPENDIX III

RESOLUTION OF THE SECURITY COUNCIL 21 APRIL 1948

The Security Council,

Having considered the complaint of the Government of India concerning the dispute over the State of Jammu and Kashmir, having heard the representative of India in support of that complaint and the reply and countercomplaints of the representatives of Pakistan,

Being strongly of opinion that the early restoration of peace and order in Jammu and Kashmir is essential and that India and Pakistan should do their utmost to bring about a cessation of all fighting,

Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite,

Considering that the continuation of the dispute is likely to endanger international peace and security;

Reaffirms the Council's Resolution of January 17th,

Resolves that the membership of the Commission established by the Resolution of the Council of January 20th, 1948, shall be increased to five and shall include in addition to the membership metioned in that Resolution, representatives of—and—and that that if the membership of the Commission has not been completed within ten days from the adoption of this Resolution, the President of the Council may designate such other Member or Members of the United Nations as are required to complete the membership of five,

Instructs the Commission to proceed at once to the Indian sub-continent and there place its good offices and mediation at the disposal of the Government of India and Pakistan with a view to facilitating the taking of the necessary measures; both with respect

to the restoration of peace and order and to the holding of a plebiscite by the two Governments, acting in co-operation with one another and with the Commission and further instructs the Commission to keep the Council informed of the action taken under the Resolution and to this end,

Recommends to the Governments of India and Pakistan the following measures as those which in the opinion of the Council are appropriate to bring about a cessation of the fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan.

A. Restoration of Peace and Order

1. The Government of Pakistan should undertake to use its best endeavours:

(*a*) To secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting and to prevent any intrusion into the State of such elements and any furnishing of material aid to those fighting in the State.

(*b*) To make known to all concerned that the measures indicated in this and the following paragraphs provide full freedom to all subjects of the State, regardless of creed, caste, or party, to express their views and to vote on the question of the accession of the State, and that therefore they should co-operate in the maintenance of peace and order.

2. The Government of India should:

(*a*) When it is established to the satisfaction of the Commission set up in accordance with the Council's Resolution of 20 January that the tribesmen are withdrawing and that arrangements for the cessation of the fighting have become effective, put into operation in consultation with the Commission a plan for withdrawing their own forces from Jammu and Kashmir and reducing them progressively to the minimum strength required for the support of the civil power in the maintenance of Law and Order,

(*b*) Make known that the withdrawal is taking place in stages and announce the completion of each stage,

(*c*) When the Indian forces shall have been reduced to the

minimum strength mentioned in (*a*) above, arrange in consultation with the Commission for the stationing of the remaining forces to be carried out in accordance with the following principles:

(*i*) That the presence of troops should not afford any intimidation or appearance of intimidation to the inhabitants of the State,

(*ii*) That as small a number as possible should be retained in forward areas,

(*iii*) That any reserve of troops which may be included in the total strength should be located within their present Base area.

3. The Government of India should agree that until such time as the plebiscite administration referred to below finds it necessary to exercise the power of direction and supervision over the State forces and police provided for in Paragraph 8 they will be held in areas to be agreed upon with the Plebiscite Administrator.

4. After the plan referred to in paragraph 2 (*a*) above has been put into operation, personnel recruited locally in each district should so far as possible be utilised for the re-establishment and maintenance of Law and Order with due regard to protection of minorities, subject to such additional requirements as may be specified by the Plebiscite Administration referred to in paragraph 7.

5. If these local forces should be found to be inadequate, the Commission, subject to the agreement of both the Government of India and the Government of Pakistan, should arrange for the use of such forces of either Dominion as it seems effective for the purpose of pacification.

B. Plebiscite

6. The Government of India should undertake to ensure that the Government of the State invite the major political group to designate responsible representatives to share equitably and fully in the conduct of the administration at the Ministerial level, while the plebiscite is being prepared and carried out.

7. The Government of India should undertake that there will be established in Jammu and Kashmir a Plebiscite Administration to hold a Plebiscite as soon as possible on the question of the accession of the State to India or Pakistan.

8. The Government of India should undertake that there will be delegated by the State to the Plebiscite Administration such powers

as the latter considers necessary for holding a fair and impartial plebiscite including, for that purpose only, the direction and supervision of the State forces of police.

9. The Government of India should at the request of the Plebiscite Administration make available from the Indian forces such assistance as the Plebiscite Administration may require for the performance of its functions.

10. (*a*) The Government of India should agree that a nominee of the Secretary-General of the United Nations will be appointed to be the Plebiscite Administrator.

(*b*) The Plebiscite Administrator, acting as an officer of the State of Jammu and Kashmir, should have authority to nominate his Assistants and other subordinates and to draft regulations governing the Plebiscite. Such nominees should be formally appointed and such draft regulations should be formally promulgated by the State of Jammu and Kashmir.

(*c*) The Government of India should undertake that the Government of Jammu and Kashmir will appoint fully qualified persons nominated by the Plebiscite Administrator to act as special magistrates within the State judicial system to hear cases which in the opinion of the Plebiscite Administrator have a serious bearing on the preparation for and the conduct of a free and impartial plebiscite.

(*d*) The terms of service of the Administtrator should form the subject of separate negotiation between the Secretary-General of the United Nations and the Government of India. The Administrator should fix the terms of service for his Assistants and subordinates.

(*e*) The Administrator should have the right to communicate direct with the Government of the State and with the Commission of the Security Council and, through the Commission with the Security Council, with the Governments of India and Pakistan and with their Representatives with the Commission. It would be his duty to bring to the notice of any or all of the foregoing (as he in his discretion may decide) any circumstances arising which may tend, in his opinion, to interfere with the freedom of the Plebiscite.

11. The Government of India should undertake to prevent and

to give full support to the Administrator and his staff in preventing any threat, coercion or intimidation, bribery or other undue influence on the voters in the plebiscite, and the Government of India should publicly announce and should cause the Government of the State to announce this undertaking as an international obligation binding on all public authorities and officials in Jammu and Kashmir.

12. The Government of India should themselves and through the Government of the State declare and make known that all subjects of the State of Jammu and Kashmir, regardless of creed, caste or party, will be safe and free in expressing their views and in voting on the question of the accession of the State and that there will be freedom of the Press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit.

13. The Government of India should use and should ensure that the Government of the State also use their best endeavours to effect the withdrawal from the State of all Indian nationals other than those who are normally resident therein or who on or since 15 August 1947 have entered it for a lawful purpose.

14. The Government of India should ensure that the Government of the State release all political prisoners and take all possible steps so that:

(*a*) all citizens of the State who have left it on account of disturbances are invited, and are free, to return to their homes and to exercise their rights as such citizens;

(*b*) there is no victimization;

(*c*) minorities in all parts of the State are accorded adequate protection.

15. The Commission of the Security Council should at the end of the plebiscite certify to the Council whether the plebiscite has or has not been really free and impartial.

C. General Provisions

16. The Governments of India and Pakistan should each be invited to nominate a Representative to be attached to the Commission for such assistance as it may require in the performance of its task.

17. The Commission should establish in Jammu and Kashmir such observers as it may require of any of the proceedings in pursuance of the measures indicated in the foregoing paragraphs.

18. The Security Council Commission should carry out the tasks assigned to it herein.

APPENDIX IV

RESOLUTION OF THE SECURITY COUNCIL 3 JUNE 1948

The Security Council,

Reaffirms its resolutions of 17th January 1948, 20th January 1948 and 21st April 1948,

Directs the Commission of Mediation to proceed without delay to the areas of dispute with a view to accomplishing in priority the duties assigned to it by the Resolution of 21st April 1948,

And directs the Commission further to study and report to the Security Council when it considers appropriate on the matters raised in the letter of Foreign Minister of Pakistan, dated the 15th January 1948, in the order outlined in paragraph D of the Resolution of the Council dated the 20th January 1948.

APPENDIX V

RESOLUTION OF THE UN COMMISSION FOR INDIA AND PAKISTAN, 13 AUGUST 1948

The United Nations Commission for India and Pakistan,

Having given careful consideration to the points of view expressed by the Represenatitives of India and Pakistan regarding the situation in the State of Jammu and Kashmir, and

Being of the opinion that the prompt cessation of hostilities and the correction of conditions the continuance of which is likely to endanger international peace and security are essential to implementation of its endeavours to assist the Governments of India and Pakistan in effecting a final settlement of the situation,

Resolves to submit simultaneously to the Governments of India and Pakistan the following proposal:

PART I

CEASE-FIRE ORDER

A. The Governments of India and Pakistan agree that their respective High Commands will issue seperately and simultaneously a cease-fire order to apply to all forces under their control in the State of Jammu and Kashmir as of the earliest practicable date or dates to be mutually agreed upon within four days after these proposals have been accepted by both Governments.

B. The High Commands of the Indian and Pakistan forces agree to refrain from taking any measures that might augment the military potential of the forces under their control in the State of Jammu and Kashmir.

(For the purpose of these proposals "forces under their control" shall be considered to include all forces, organised and unorganised, fighting or participating in hostilities on their respective sides.)

C. The Commanders-in-Chief of the forces of India and Pakistan shall promptly confer regarding any necessary local changes in present dispositions which may facilitiate the cease-fire.

D. In its discretion and as the Commission may find practicable, the Commission will appoint military observers who, under the authority of the Commission and with the cooperation of both Commands, will supervise the observance of the cease-fire order.

E. The Government of India and the Government of Pakistan agree to appeal to their respective peoples to assist in creating and maintaining an atmosphere favourable to the promotion of further negotiations.

PART II

TRUCE AGREEMENT

Simultaneously with the acceptance of the proposal for the immediate cessation of hostilities as outlined in PART I, both Governments accept the following principles as a basis for the formulation of a truce agreement, the details of which shall be worked out in discussion between their Representatives and the Commission.

*A.*1. As the presence of troops of Pakistan in the territory of the State of Jammu and Kashmir constitutes a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agree to withdraw its troops from that State.

2. The Government of Pakistan will use its best endeavour to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistan nationals not normally resident therein who have entered the State for the purpose of fighting.

3. Pending a final solution, the territory evacuated by the Pakistan troops will be administered by the local authorities under the surveillance of the Commission.

*B.*1. When the Commission shall have notified the Government of India that the tribesmen and Pakistani nationals referred to in PART II, A, 2 hereof have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian

forces in the State of Jammu and Kashmir, and further, that the Pakistan forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of its forces from that State in stages to be agreed upon with the Commission.

2. Pending the acceptance of the conditions for a final settlement of the situation in the State of Jammu and Kashmir, the Indian Government will maintain within the lines existing at the moment of the cease-fire the minimum strength of its forces which in agreement with the Commission are considered necessary to assist local authorities in the observance of law and order. The Commission will have observers stationed where it deems necesssary.

3. The Government of India will undertake to ensure that the Government of the State of Jammu and Kashmir will take all measures within its power to make it publicly known that peace, law and order will be safeguarded and that all human and political rights will be guaranteed.

C.1. Upon signature, the full text of the Truce Agreement or a communique containing the principles thereof as agreed upon between the two Governments and the Commission, will be made public.

Part III

The Government of India and the Government of Pakistan reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people and to that end, upon acceptance of the Truce Agreement, both Governments agree to enter into consultations with the Commission to determine fair and equitable conditions whereby such free expression will be assured.

APPENDIX VI

RESOLUTION OF THE UN COMMISSION FOR INDIA AND PAKISTAN, 5 JANUARY 1949

The United Nations Commission for India and Pakistan, having received from the Governments of India and Pakistan, in communications dated 23 December and 25 December 1948, respectively, their acceptance of the following principles which are supplementary to the Commission's Resolution of 13 August 1948:

1. The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite;

2. A plebiscite will be held when it shall be found by the Commission that the cease-fire and truce arrangements set forth in Parts I and II of the Commission's Resolution of 13 August 1948 have been carried out and arrangements for the plebiscite have been completed;

3. (*a*) The Secretary-General of the United Nations will, in agreement with the Commission, nominate a Plebiscite Administrator who shall be a personality of high international standing and commanding general confidence. He will be formally appointed to office by the Government of Jammu and Kashmir;

(*b*) The Plebiscite Administrator shall derive from the State of Jammu and Kashmir the powers he considers necessary for organising and conducting the plebiscite and for ensuring the freedom and impartiality of the plebiscite;

(*c*) The Plebiscite Administrator shall have the authority to appoint such staff or Assistants and Observers as he may require;

4. (*a*) After implementation of Parts I and II of the Commission's Resolution of 13 August 1948, and when the Commission is satisfied that peaceful conditions have been restored in the State, the Commission and the Plebiscite Administrator will determine, in consultation with the Government of India, the final disposal of

Indian and State armed forces, such disposal to be with due regard to the security of the State and the freedom of the Plebiscite;

(*b*) As regards the territory referred to in A, 2 of Part II of the Resolution of 13 August, final disposal of the armed forces in that territory will be determined by the Commission and the Plebiscite Administrator in consultation with the local authorities;

5. All civil and military authorities within the State and the principal political elements of the State will be required to co-operate with the Plebiscite Administrator in the preparation for and the holding of the plebiscite;

6. (*a*) All citizens of the State who have left it on account of the disturbances will be invited and be free to return and to exercise all their rights as such citizens. For the purpose of facilitating repatriation there shall be appointed two Commissions, one composed of nominees of India and the other of nominees of Pakistan. The Commission shall operate under the direction of the Plebiscite Administrator. The Governments of India and Pakistan and all authorities within the State of Jammu and Kashmir will collaborate with the Plebiscite Administrator in putting this provision into effect;

(*b*) All persons (other than citizens of the State), who on or since 15 August 1947 have entered it for other than lawful purposes, shall be required to leave the State;

7. All authorities within the State of Jammu and Kashmir will undertake to ensure, in collaboration with the Plebiscite Administrator, that:

(*a*) There is no threat, coercion or intimidation, bribery or other undue influence on the voters in the plebiscite;

(*b*) No restrictions are placed on legitimate political activity throughout the State. All subjects of the State, regardless of creed, caste or party, shall be safe and free in expressing their views and in voting on the question of the accession of the State to India or Pakistan. There shall be freedom of press, speech and assembly, freedom of travel in the State, including freedom of lawful entry and exit;

(*c*) All political prisoners are released;

(*d*) Minorities in all parts of the State are accorded adequate protection; and

(*e*) There is no victimization.

8. The Plebiscite Administrator may refer to the United Nations Commission for India and Pakistan problems on which he may require assistance, and the Commission may in its discretion call upon the Plebiscite Administrator to carry out on its behalf any of the responsibilities with which it has been entrusted;

9. At the conclusion of the plebiscite, the Plebiscite Administrator shall report the result thereof to the Commission and to the Government of Jammu and Kashmir. The Commission shall then certify to the Security Council whether the plebiscite has or has not been free and impartial;

10. Upon the signature of the Truce Agreement, the details of the foregoing proposals will be elaborated in the consultations envisaged in Part III of the Commission's Resolution of 13 August 1948. The Plebiscite Administrator will be fully associated in these consultations;

Commends the Governments of India and Pakistan for their prompt action in ordering a cease-fire to take effect from one minute before midnight of 1 January 1949, pursuant to the agreement arrived at as provided for by the Commission's Resolution of 13 August 1948; and

Resolves to return in the immediate future to the Sub-continent to discharge the responsibilities imposed upon it by the Resolution of 13 August 1948 and by the foregoing principles.

APPENDIX VII

RESOLUTION OF THE SECURITY COUNCIL 14 MARCH 1950

Having received and noted the reports of the United Nations Commission for India and Pakistan, established by the Resolutions of 20 January and 21 April 1948;

Having also received and noted the report of General A.G.L. McNaughton on the outcome of his discussions with the representatives of India and Pakistan which were initiated in pursuance of the decision taken by the Security Council on 17th December 1949;

Commending the Governments of India and Pakistan for their statesmenlike action in reaching the agreements embodied in the United Nations Commission's Resolutions of 13 August 1948 and 5 January 1949 for a cease-fire, for the demilitarization of the State of Jammu and Kashmir and for the determination of its final disposition in accordance with the will of the people through the democratic method of a free and impartial plebiscite and commending the parties in particular for their action in partially implementing these resolutions by,

(1) The cessation of hostilities effected on 1 January 1949,

(2) The establishment of a cease-fire line on 27 July 1949, and

(3) The agreement that Fleet Admiral Chester W. Nimitz shall be Plebiscite Administrator;

Considering that the resolution of the outstanding difficulties should be based upon the substantial measure of agreement on fundamental principles already reached, and that steps should be taken forthwith for the demilitarization of the State and for the expeditious determination of its future in accordance with the freely expressed will of the inhabitants;

The Security Council,

1. *Calls upon* the Governments of India and Pakistan to make immediate arrangements, without prejudice to their rights or claims

and with due regard to the requirements of law and order, to prepare and execute within a period of five months from the date of this Resolution a programme of demilitarization on the basis of the principles of paragraph 2 of General McNaughton's proposal or of such modifications of those principles as may be mutually agreed;

2. *Decides* to appoint a United Nations Representative for the following purposes who shall have authority to perform his functions in such place or places as he may deem appropriate:

(*a*) to assist in the preparation and to supervise the implementation of the programme of demilitarization referred to above and to interpret the agreements reached by the parties for demilitarization,

(*b*) to place himself at the disposal of the Governments of India and Pakistan and to place before those Governments or the Security Council any suggestions which, in his opinion, are likely to contribute to the expeditious and enduring solution of the dispute which has arisen between the two Governments in regard to the State of Jammu and Kashmir,

(*c*) to exercise all of the powers and responsibilities devolving upon the United Nations Commission by reason of existing Resolutions of the Security Council and by reason of the agreement of the parties embodied in the Resolutions of the United Nations Commission of 13 August 1948 and 5 January 1949,

(*d*) to arrange at the appropriate stage of demilitarization for the assumption by the Plebiscite Administrator of the functions assigned to the latter under agreements made between the parties,

(*e*) to report to the Security Council as he may consider necessary submitting his conclusions and any recommendations which he may desire to make;

3. *Requests* the two Governments to take all necessary precautions to ensure that their agreements regarding the cease-fire shall continue to be faithfully observed, and calls *upon them* to take all possible measures to ensure the creation and maintenance of an atmosphere favourable to the promotion of further negotiations;

4. *Extends* its best thanks to the members of the United Nations Commission for India and Pakistan and to General A.G.L. McNaughton for their arduous and fruitful labours;

5. *Agrees* that the United Nations Commission for India and

Pakistan shall be terminated, and decides that this shall take place one month after both parties have informed the United Nations Representative of their acceptance of the transfer to him of the powers and responsibilities of the United Nations Commission referred to in paragraph 2(*c*) above.

APPENDIX VIII

RESOLUTION OF THE SECURITY COUNCIL 30 MARCH 1951

Having received and noted the report of Sir Owen Dixon, the United Nations Representative for India and Pakistan, on his mission initiated by the Security Council Resolution of 14 March 1950;

Observing that the Governments of India and Pakistan have accepted the provisions of the United Nations Commission for India and Pakistan Resolutions of 13 August 1948 and 5 January 1949; and have reaffirmed their desire that the future of the State of Jammu and Kashmir shall be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations;

Observing that on 27 October 1950 the General Council of the "All Jammu and Kashmir National Conference" adopted a resolution recommending the convening of a Constituent Assembly for the purpose of determining the "Future shape and affiliations of the State of Jammu and Kashmir"; observing further from the statements of responsible authorities that action is proposed to convene such a Constituent Assembly and that the area from which such a Constituent Assembly would be elected is only a part of the whole territory of Jammu and Kashmir;

Reminding the Governments and Authorities concerned of the principle embodied in the Security Council Resolutions of 21 April 1948, 3 June 1948 and 14 March 1950 and the United Nations Commission for India and Pakistan Resolutions of 13 August 1948 and 5 January 1949, that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations;

Affirming that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference," and any action that Assembly might attempt to take to determine the future shape and affiliations of the entire State or any part thereof would not constitute a disposition of the State in accordance with the above principle;

Declaring its belief that it is the duty of the Security Council in carrying out its primary responsibility for the maintenance of international peace and security to aid the parties to reach an amicable solution of the Kashmir dispute and that a prompt settlement of this dispute is of vital importance to the maintenance of international peace and security;

Observing from Sir Owen Dixon's report that the main points of difference preventing agreement between the parties were:

(*a*) the procedure for and the extent of demilitarization of the State preparatory to the holding of a plebiscite; and

(*b*) the degree of control over the exercise of the functions of Government in the State necessary to ensure a free and fair plebiscite;

The Security Council,

1. *Accepts*, in compliance with his request, Sir Owen Dixon's resignation and expresses its gratitude to Sir Owen for the great ability and devotion with which he carried out his mission;

2. *Decides* to appoint a United Nations Representative for India and Pakistan in succession to Sir Owen Dixon;

3. *Instructs* the United Nations Representative to proceed to the Sub-continent and, after consultation with the Government of India and Pakistan, to effect the demilitarization of the State of Jammu and Kashmir on the basis of the United Nations Commission for India and Pakistan Resolutions of 13 August 1948 and 5 January 1949;

4. *Calls* upon the parties to co-operate with the United Nations Representative to the fullest degree in effecting the demilitarization of the State of Jammu and Kashmir;

5. *Instructs* the United Nations Representative to report to the Security Council within three months from the date of his arrival on the Sub-continent. If, at the time of this report, he has not effected demilitarization in accordance with paragraph 3 above,

or obtained the agreement of the parties to a plan for effecting such demilitarization, the United Nations Representative shall report to the Security Council those points of difference between the parties in regard to the interpretation and execution of the agreed Resolutions of 13 August 1948 and 5 January 1949 which he considers must be resolved to enable such demilitarization to be carried out;

6. *Calls upon* the parties, in the event of their discussions with the United Nations Representative failing in his opinion to result in full agreement, to accept arbitration upon all outstanding points of difference reported by the United Nations Representative in accordance with paragraph 5 above; such arbitration to be carried out by an Arbitrator, or a panel of Arbitrators, to be appointed by the President of the International Court of Justice after consultation with the parties;

7. *Decides* that the Military Observer Group shall continue to supervise the cease-fire in the State;

8. *Requests* the Governments of India and Pakistan to ensure that their agreement regarding the cease-fire shall continue to be faithfully observed and calls upon them to take all possible measures to ensure the creation and maintenance of an atmosphere favourable to the promotion of further negotiations and to refrain from any action likely to prejudice a just and peaceful settlement;

9. *Requests* the Secretary-General to provide the United Nations Representative for India and Pakistan with such services and facilities as may be necessary in carrying out the terms of this Resolution.

APPENDIX IX

RESOLUTION OF THE SECURITY COUNCIL 10 NOVEMBER 1951

The Security Council,

Having received and noted the report of Dr. Frank Graham, the United Nations Representative for India and Pakistan, on his mission initiated by the Security Council Resolution of 30 March 1951, and having heard Dr. Graham's address to the Council on 18 October,

Noting with approval the basis for a programme of demilitarization which could be carried out in conformity with the previous undertakings of the parties, put forward by the United Nations Representative in his communication of 7 September 1951 to the Prime Ministers of India and Pakistan:

1. *Notes* with gratification the declared agreement of the two parties to those parts of Dr. Graham's proposals which reaffirm their determination to work for a peaceful settlement, their will to observe the cease-fire agreement and their acceptance of the principle that the accession of the State of Jammu and Kashmir should be determined by a free and impartial plebiscite under the auspices of the United Nations;

2. *Instructs* the United Nations Representative to continue his efforts to obtain agreement of the parties on a plan for effecting the demilitarization of the State of Jammu and Kashmir;

3. *Calls upon* the parties to co-operate with the United Nations Representative to the fullest degree in his efforts to resolve the outstanding points of difference between them;

4. *Instructs* the United Nations Represenatative to report to the Security Council on his efforts, together with his views concerning the problems confided to him, not later than six weeks after this Resolution comes into effect.

APPENDIX X

RESOLUTION OF THE SECURITY COUNCIL 23 DECEMBER 1952

The Security Council,

Recalling its Resolutions of 30 March 1951, 30 April 1951 and 10 November 1951;

Further recalling the provisions of the United Nations Commission for India and Pakistan Resolutions of 13 August 1948 and 5 January 1949 which were accepted by the Governments of India and Pakistan and which provided that the question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations;

Having received the Third Report dated 22 April 1952 and the Fourth Report dated 16 September 1952 of the United Nations Representative for India and Pakistan;

Endorses the general principles on which the United Nations Representative has sought to bring about agreement between the Governments of India and Pakistan;

Notes with gratification that the United Nations Representative has reported that the Governments of India and Pakistan have accepted all but two of the paragraphs of his twelve-point proposals;

Notes that agreement on a plan of demilitarization of the State of Jammu and Kashmir has not been reached because the Governments of India and Pakistan have not agreed on the whole of paragraph 7 of the twelve-point proposals;

Urges the Governments of India and Pakistan to enter into immediate negotiations under the auspices of the United Nations Representative for India and Pakistan in order to reach agreement on the specific number of forces to remain on each side of the cease-fire line at the end of the period of demilitarization, this number to be between 3,000 and 6,000 armed forces remaining on the Pakistan

side of the cease-fire line and between 12,000 and 18,000 armed forces remaining on the India side of the cease-fire line, as suggested by the United Nations Representative in his proposals of 16 July 1952 (Annex III of S/2783) such specific number to be arrived at bearing in mind the principles of criteria contained in paragraph 7 of the United Nations Representative's proposal of 4 September 1952 (Annex VIII of S/2783);

Records its gratitude to the United Nations Representative for India and Pakistan for the great efforts which he has made to achieve a settlement and

Requests him to continue to make his service available to the Governments of India and Pakistan to this end;

Requests the Governments of India and Pakistan to report to the Security Council not later than thirty days from the date of the adoption of this Resolution; and further *requests* the United Nations Representative for India and Pakistan to keep the Security Council informed of any progress.

APPENDIX XI

RESOLUTION OF THE SECURITY COUNCIL 24 JANUARY 1957

The Security Council,

Having heard statements from representatives of the Governments of India and Pakistan concerning the dispute over the State of Jammu and Kashmir,

Reminding the Governments and Authorities concerned of the Principle embodied in its Resolutions of 21 April 1948, 3 June 1948, 14 March 1950 and 30 March 1951, and the United Nations Commission for India and Pakistan resolutions of 13 August 1948 and 5 January 1949, that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.

Reaffirms the affirmation in its resolution of 30 March 1951 and declares that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle;

Decides to continue its consideration of the dispute.

APPENDIX XII

RESOLUTION OF THE SECURITY COUNCIL 21 FEBRUARY 1957

The Security Council,

Recalling its Resolution of January 24, 1957, its previous resolutions and the resolutions of the United Nations Commission for India and Pakistan on the India-Pakistan Question,

Requests the President of the Security Council, the representative of Sweden, to examine with the Governments of India and Pakistan any proposals which, in his opinion, are likely to contribute towards the settlement of the dispute, having regard to the previous Resolutions of the Security Council and of the United Nations Commission for India and Pakistan to visit the subcontinent for this purpose; and to report to the Security Council not later than April 15, 1957;

Invites the Governments of India and Pakistan to co-operate with him in the performance of these functions;

Requests the Secretary-General and the United Nations representative for India and Pakistan to render such assistance as he may request.

APPENDIX XIII

RESOLUTION OF THE SECURITY COUNCIL 2 DECEMBER 1957

The Security Council,

Having received and noted with appreciation the report of Mr. Gunnar V. Jarring, the representative of Sweden, on the mission undertaken by him pursuant to the Security Council Resolution of 21st February, 1957;

Expressing its thanks to Mr. Jarring for the care and ability with which he has carried out his mission;

Observing with appreciation the expressions made by both parties of sincere willingness to co-operate with the UN in finding a peaceful solution;

Observing further that the Governments of India and Pakistan recognize and accept the provisions of its Resolution dated 17 January 1948 and of the Resolutions of the UN Commission for India and Pakistan dated 13 August 1948 and 5th January 1949, which envisage in accordance with their terms the determination of the future status of the State of Jammu and Kashmir in accordance with the will of the people through the democratic method of a free and impartial plebiscite, and that Mr. Jarring felt it appropriate to explore what was impeding their full implementation;

Concerned over the lack of progress toward a settlement of the dispute which his report manifests;

Considering the importance which it has attached to demilitarisation of the State of Jammu and Kashmir as one of the steps towards a settlement.

Recalling its previous Resolutions and the Resolutions of UNCIP on the India-Pakistan question;

1. *Requests* the Government of India and the Government of Pakistan to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate

the situation and to appeal to their respective peoples to assist in creating and maintaining an atmosphere favourable to the promotion of further negotiations;

2. *Requests* the United Nations Representative for India and Pakistan to make any recommendations to the parties for further appropriate action with a view to making progress toward the implementation of the Resolutions of the United Nations Commission for India and Pakistan of 13 August 1948 and 5 January 1949 and toward a peaceful settlement;

3. *Authorises* the UN Representative to visit the Sub-continent for these purposes; and

4. *Instructs* the UN Representative to report to the Security Council on his efforts as soon as possible.

APPENDIX XIV

RESOLUTION OF THE SECURITY COUNCIL 4 SEPTEMBER 1965

The Security Council,

Noting the Report of the Secretary-General (S/6651) dated September 3, 1965;

Having heard the statements of the representatives of India and Pakistan;

Concerned at the deteriorating situation along the cease-fire line in Kashmir;

1. *Calls upon* the Governments of India and Pakistan to take forthwith all steps for an immediate cease-fire;

2. *Calls upon* the two Governments to respect the cease-fire line and have all armed personnel of each party withdrawn to its own side of the line;

3. *Calls upon* the two Governments to cooperate fully with the United Nations Military Observer Group in India and Pakistan in its task of supervising the observance of the cease-fire;

4. *Requests* the Secretary-General to report to the Council within three days on the implementation of this Resolution.

APPENDIX XV

RESOLUTION OF THE SECURITY COUNCIL 6 SEPTEMBER 1965

The Security Council,

Noting the Report by the Secretary General on developments in the situation in Kashmir since the adoption of the Security Council Cease-fire Resolution on 4 September 1965 (S/RES/209/1965) being document S/6661 dated 6 September, 1965;

Noting with deep concern the extension of the fighting which adds immeasurably to the seriousness of the situation,

1. *Calls upon* the Parties to cease hostilities in the entire area of conflict immediately, and promptly withdraw all armed personnel back to the positions held by them before 5 August, 1965;

2. *Requests* the Secretary General to exert every possible effort to give effect to this Resolution and the Resolution of 4 September 1965, to take all measures possible to strengthen the UNMOGIP, and to keep the Council promptly and currently informed on the implementation of the Resolutions and on the situation in the area;

3. *Decides* to keep this issue under urgent and continuous review so that the Council may determine what further steps may be necessary to secure peace and security in the area.

APPENDIX XVI

RESOLUTION OF THE SECURITY COUNCIL 20 SEPTEMBER 1965

The Security Council,

Having considered the Reports of the Secretary-General on his consultations with the Governments of India and Pakistan, commending the Secretary-General for his unrelenting efforts in furtherance of the objectives of the Security Council's Resolutions of 4 and 6 September;

Having heard the statements of the Representatives of India and Pakistan;

Noting the differing replies by the parties to an appeal for a cease-fire as set out in the Report of the Secretary-General (S/6683), but noting further with concern that no cease-fire has yet come into being;

Convinced that an early cessation of hostilities is essential as a first step towards a peaceful settlement of the outstanding differences between the two countries on Kashmir and other related matters;

1. *Demands* that a cease-fire should take effect on Wednesday, 22 September 1965, at 0700 hours GMT and calls upon both Governments to issue orders for a cease-fire at that moment and a subsequent withdrawal of all armed personnel back to the positions held by them before 5 August 1965;

2. *Requests* the Secretary-General to provide the necessary assistance to ensure supervision of the cease-fire and withdrawal of all armed personnel;

3. *Calls* on all States to refrain from any action which might aggravate the situation in the area;

4. *Decides* to consider as soon as operative paragraph 1 of the Council's resolution 210 of 6 September has been implemented, what steps could be taken to assist towards a settlement of the political problem underlying the present conflict, and in the mean-

time calls on the two Governments to utilize all peaceful means, including those listed in Article 33 of the Charter, to this end;

5. *Requests* the Secretary-General to exert every possible effort to give effect to this Resolution, to seek a peaceful solution, and to report to the Security Council thereon.

APPENDIX XVII

RESOLUTION OF THE SECURITY COUNCIL 27 SEPTEMBER 1965

The Security Council,

Noting Reports of the Secretary-General (S/6710, add. 1 and 2);

Reaffirming its Resolutions of 4, 6 and 20 September 1965 (S/Res/209, S/Res/210, S/Res/211);

Expressing the grave concern of the Council that the cease-fire agreed to unconditionally by the Governments of India and Pakistan is not holding;

Recalling that the cease-fire demand in the Council's Resolutions was unanimously endorsed by the Council and agreed to by the Governments of both India and Pakistan;

Demands that the parties urgently honour their commitments to the Council to observe the cease-fire; and further calls upon the parties promptly to withdraw all armed personnel as necessary steps in the full implementation of the Resolution of September 20.

APPENDIX XVIII

RESOLUTION OF THE SECURITY COUNCIL 5 NOVEMBER 1965

The Security Council,

Regretting the delay in the full achievement of a complete and effective cease-fire and a prompt withdrawal of armed personnel to the positions held by them before 5 August 1965, as called for in its Resolutions 209 (1965) of 4 September, 210 (1965) of 6 September, 211 (1965) of 20 September and 214 (1965) of 27 September 1965;

1. *Reaffirms* its Resolution 211 (1965) of 20 September 1965 in all its parts;

2. *Requests* the Governments of India and Pakistan to co-operate towards a full implementation of paragraph 1 of Resolution 211 (1965); calls upon them to instruct their armed personnel to co-operate with the United Nations and cease all military activity; and insists that there be an end to violations of the cease-fire;

3. *Demands* the prompt and unconditional execution of the proposal already agreed to in principle by the Governments of India and Pakistan that their representatives meet with a suitable representative of the Secretary General, to be appointed without delay after consultation with both parties, for the purpose of formulating an agreed plan and schedule for the withdrawals by both parties; urges that such a meeting shall take place as soon as possible and that such a plan contain a time-limit on its implementation; and requests the Secretary-General to report on the progress achieved in this respect within three weeks of the adoption of the present resolution;

4. *Requests* the Secretary-General to submit for its consideration as soon as possible a report on compliance with the present resolution.

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